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cided during last Session have, with a few exceptions, been supplied. The plan of procuring copies of the judgments not having been suggested till late in the Session, a great number are wanting; but it is understood, that, hereafter, they are to be regularly obtained.

It occurred to the Authors, that the usefulness of such a Collection must be very limited, unless some mode were adopted to make the contents known; and that a general view of the nature of all the cases, and of the decisions, published early in each Session, as an Index to the Collection, might be acceptable. This idea they have been encouraged to carry into effect: and having the Papers and Judgments in their possession, and attending regularly to the deliberations of the Court, they venture to submit this Number as a specimen of their plan. They do not pretend to offer either a selection or a detailed report of the cases,—that being the duty of the Gentlemen appointed to collect the Decisions. They have given neither the arguments of the parties, nor even the authorities; but have confined themselves to a short notice of each case, which they hope may convey an intelligible account of it, enabling those who wish to inquire farther to consult the Col-

itself. Occasionally they have also introduced those observations which made on the Bench, tending to illustrate the decision, or to explain or correct cases: And as for these they have no difficulty to refer to, they offer them with the diffidence.

It was their intention to have given a survey of the cases decided in the Court of Justices; but circumstances have prevented from doing so at present.

In this Work they have appended, and propose to continue, the Decisions on points of criminal law in the Court of Justices which are to be found in the Record subsequently to the beginning of 1819, when the edition of Mr. Hume's Commentaries was published. In doing this, they have, in general, quoted the objections, and the Judgments, as entered in the Record.

As the Curators of the Library mean to arrange in separate volumes the papers relative to the Teind-Court and to the Court of Justices, it is proposed, if a second Number of the Work should be called for, to publish it in a form which will allow it to be referred to as an Index to these Collections.





Gw. V. K.  
Scotl. 100  
S 50





# CASES

DECIDED IN

THE COURT OF SESSION,

FROM

MAY 12, 1821, TO JULY 11, 1822.

REPORTED BY

PATRICK SHAW AND JAMES BALLANTINE,  
ESQUIRES, ADVOCATES.

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1822.



# JUDGES

OF THE

## COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

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### FIRST DIVISION.

Lord President HOPE.

Lord BALMUTO, (who resigned, and was succeeded by Lord GILLIES).

Lord HERMAND.

Lord SUCCOTH.

Lord BALGRAY.

### PERMANENT LORDS ORDINARY.

Lord GILLIES, (who having been appointed to the Inner House, was succeeded by Lord MEADOWBANK).

Lord ALLOWAY.

### SECOND DIVISION.

Lord Justice-Clerk BOYLE.

Lord GLENLEE.

Lord BANNATYNE.

Lord ROBERTSON.

Lord CRAIGIE.

grandmother, Jean Porterfield, under the above-quoted substitution in the entail 1721, with the nomination in the deed 1742. Sir M. S. Stewart claimed under the subsequent substitution, as representing the eldest heir-female of the body of the maker of the entail. Mr. Corbet Porterfield rested on the deed 1742, as evidence that he was the substitute under the entail 1721 ; while Sir M. S. Stewart contended, on several grounds, that under the deed 1742, Mr. Corbet Porterfield was not entitled to be served. In reference to Sir M. S. Stewart's objections, the Court held,

1. That the deed 1742, being a mortis causa deed, and containing a liferent in favour of the grantor's wife, and a power of revocation, did not require delivery.

2. That although the maker had exceeded his powers as to certain of the substitutes under the entail 1721, this did not annul the deed 1742, so far as within his powers.

3. That the clause in the entail 1721 was not a reserved power, but a substitution *heredibus nominandis* ; and that the deed 1742 was a sufficient exercise of the power of nomination in pointing out and naming the substitutes to succeed under it.

4. That the deed 1742 being part of that of 1721, on which the estate had been possessed, and on which both parties founded, there were no *termini habiles* for pleading prescription against the deed 1742.\*

A. SWINTON, W. S.—WILLIAM PATRICK, W. S.—Agents.

\* In this case, a point of declinature was decided. Sir M. S. Stewart declined Lord Glenlee, on the ground that his daughter was

Mrs. FERGUSSON and Miss BALLANTINE, Suspenders.—*Blackwell.*

No. 7.

QUAIL GALLOWAY, Charger.—*Clerk—Fergusson.*

*Lease.*—Galloway was subtenant of a stone-quarry, formerly wrought under a tack, which provided that the workings should continue to be made 'regularly, and to the dip of the stone;' and having begun to increase the breadth of the quarry, a bill of suspension and interdict was presented, on the ground, that, in so doing, he violated the above terms of the contract; and that he had no right to enlarge the boundaries of the quarry, as they existed at the commencement of the lease. The Lord Ordinary passed the bill of suspension, but refused the interdict, and the Court adhered.

May 16, 1821.

FIRST DIVISION.

Bill-Chamber.

Lord Meadowbank.  
S.

WM. BALLANTINE, W. S.—ARCHD. CRAUFUIRD, W. S.  
Agents.

JAMES HAIG, Pursuer.—*Clerk—Buchanan.*

No. 8.

Mrs. FORBES and Others, Defenders.—*Baird.*

*Superior and Vassal—Res Judicata.*—Mrs. Forbes and others, as apparent heirs of John Moodie, their father, the vassal last infeft in Blairhall, sold it to Dr. Moodie, who failed to pay the price. After being infeft on their disposition, he charged them to enter heirs in special to their father, and then adjudged in implement; but he was not infeft on

May 16, 1821.

SECOND DIVISION.

Lord Pitmilley.

F.

was married to the second son of Sir M.; and after consulting with all the Judges, the declinature was sustained. On this point, there is only a petition among the papers.



the adjudication. Haig, the superior, having got final decree against Dr. Moodie in an action of non-entry, the defenders, Forbes, &c. appeared, and craved an entry on payment of the feu-duties ; maintaining,—1. That Dr. Moodie's titles were not sufficient to take the estate out of the hereditas jacens of their ancestor : 2. That, at all events, the charge was inept, the husband of one of the defenders not having been charged ; and, 3. That the adjudication in favour of Dr. Moodie proceeded on a disposition dated December 1809 ; whereas that granted by them was in December 1808.

The Court held,—

1. That the decree of non-entry against Dr. Moodie was not *res judicata* against the defenders, who were not then parties to the action.

2. That they were entitled to an entry on payment of the feu-duties only.\*

One Judge considered the blunder in the adjudication fatal to it.

GIBSON, CHRISTIE, & WARDLAW, W. S.—GEO. WILSON,—Agents.

\* In the papers, it is said to have been decided, in a question between Haig and Dr. Moodie, that the superior is not bound to call the heir of the vassal last infest in an action of non-entry against a singular successor ; but two of the Judges, in giving their opinions, rather dissented, especially where the heir is known.

THOS. GRIERSON, W.S. Pursuer.—*Thomson—Walker.*  
ROBT. WALLACE and Others, Defenders.—*Baird.*

No. 9.

*Legacy—Creditor of Defunct.*—Grierson was cautioner along with Thomas Wallace, father of William Wallace, in a cash-credit for William's use, and held a letter of relief from Thomas.—Thomas dying, left his heritable property to William, under the real burden of certain legacies to the defenders, his other children, who afterwards exchanged the real for William's personal security. William becoming insolvent, Grierson paid the balance on the cash-account; and raised action on the letter of relief by Thomas against the defenders, as having taken or claimed the legacies under their father's settlement; and concluding for payment of the debt, if they had received as much; or at least of the sums they had drawn, or were entitled to draw. The Lord Ordinary decerned against the defenders; and the Court holding, that though by exchanging the real for William's personal security, they became his creditors; yet, in a question with a creditor of their father, they were legatees, and, therefore, entitled to their legacies only deductis debitis.

May 16, 1821.

SECOND DIVISION.  
Lord Pitmilley.  
M.K.

Observed, that this case was not like that of Executors of Macomie, 26th July 1760, (Mor. 8087), relied on by the defenders.—As, 1st, There was no evidence, as in that case, that there was a sufficiency of funds: And, 2d, The legacies here had not been paid.

THOS. GRIERSON, W. S.—RO. RATTRAY, W. S.—Agents.

No. 10. JAMES RHIND and Others, Advocators.—*Jeffrey—Cunninghame.*

THOS. M'KENZIE, Respondent.—*Moncreiff—Mathe-son.*

May 16, 1821.

SECOND DIVISION.  
Lord Cringletie.  
B.

*Expences—Stamp.*—Expences incurred in object-  
ing to a summons, two petitions, and two executions  
of poindings, as not duly stamped, refused, in re-  
spect,—1. That the stamp-master of the place was  
not, at the time the proceedings were raised, in pos-  
session of the proper stamped paper; and, 2. That  
communi errore executions of poinding were, through-  
out Scotland, usually written on unstamped paper.

Æ. M'BEAN, W. S.—K. & T. M'KENZIE, W. S.—Agents.

No. 11. WILLIAM GRAY, Petitioner.—*Murray.*

May 17, 1821.

FIRST DIVISION.  
H.

*Freehold Qualification.*—Decree, (in absence), or-  
daining Gray to be inrolled as a freeholder of the  
county of Dumbarton, on a petition and complaint  
by him against the freeholders who had refused to  
inrol him, on the ground that his vote was 'nominal,  
' fictitious, and confidential.'

THOMSON & FLEMING, W. S.—Agents.

No. 12. JOSEPH BAIN, Suspender.—*Greenshields.*  
HENRY BOWIE and SONS, Chargers.—*More.*

May 17, 1821.

FIRST DIVISION.  
Lord Gillies.  
H.

*Carrier.*—Bain suspended a charge on a decree by  
the inferior court for the value of a parcel of goods,  
addressed to a person in London, which had been re-

ceived at his coach-office, and which had been lost. The Lord Ordinary found the letters orderly proceeded; but the Court, after a proof, altered that judgment, 'in respect the suspender only undertakes to carry to Carlisle; and that the parcel in question was carried thither, and delivered there safe; and that the suspender did not undertake to carry the said parcel by the mail-coach.'

WM. POLLOCK—ALEX. NAIRNE, W. S.—Agents.

ALEXANDER GOODSIR.—*Skene—Mailand.*

CHALMERS' TRUSTEES.—*L'Amy—Hope.*

No. 13.

In an action of multiplepounding and exoneration by Chalmers' trustees, in which Goodsir did not appear, though personally cited, decree of exoneration was pronounced. This decree becoming final, the extract was laid before a clerk of Session for signature. To prevent it being signed, Goodsir shewed a representation which he had prepared against the decree, but which, as the Session was up, he could not get marked, neither by the fee-fund collector or clerk of process. And he then presented a bill of suspension and interdict, which having been passed, two questions arose.—1<sup>st</sup>, Whether a bill of suspension and interdict be competent to stop a clerk of Session from signing an extract of a final decree? and, 2<sup>d</sup>, Whether the extract not having been actually signed, the representation, now duly marked, could be received to the effect of opening up the final decree of exoneration?

1. The Lord Ordinary held the suspension incompetent, and found the letters orderly proceeded, and the Court adhered.

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FIRST DIVISION.

Lord Alloway.

H.

2. The Lord Ordinary held, that the extract not having been signed, Goodsir could be reponed against the final decree only on payment of the whole previous expences, 'in respect that the summons of multiplepoinding was executed against him personally, and in respect that it is instructed that both he and his agent were acquainted with the whole procedure.' To this the Court adhered; but, after considerable discussion, held, that in the expences to be thus previously paid should not be included certain expences incurred by Chalmers' trustees, in discussing the claims of other creditors to rank on the fund in medio, previous to the decree of exoneration.

THOS. WALKER—GORDON & WILSON, W. S.—Agents.

**No. 14.** CHARLES A. MOIR, Charger.—*Moncreiff—Alison.*  
A. and J. GRAHAM, Suspenders.—*Bell—Menzies.*

May 17, 1821. *Interest—Expences.*—Grahams, tenants of Moir, were bound, by their lease, to pay interest on rent past due; but having got into a dispute with their landlord as to the rent payable for a certain year, they declined to pay the rent for the subsequent years, unless they should receive a discharge for the sum, which they offered as in full of the disputed year's rent. The Court found them liable for interest at 5 per cent., as they had neither consigned the rents, nor offered to pay them to account.

SECOND DIVISION.  
Lord Cringletie.  
B.

Moir was found liable in the expences of resisting the nomination of an oversman, in the mode pointed out in the lease.

MARTIN & STEVENSON, W. S.—JAS. DUNDAS, W. S.—Agents.

**MAGISTRATES OF LAUDER.—Cockburn—Ivory.**

**No. 15.**

**A. SPENCE and Others, Burgesses of Lauder, et e  
contra.—Moncreiff—Christison.**

*Burgh—Title to pursue.*—Actions of declarator were instituted by the Magistrates, and by a number of the burgesses of Lauder, against each other,—by the former to have it declared, that a certain commony belonged in property to the burgh; and that, as administrators, they had the free disposal of it for the burgh;—and by the latter to have it found, that the commony belonged exclusively to the individual burgesses pro indiviso; and that they were not subject, in their possession of it, to the controul of the Magistrates. In reference to the pleas of the parties, and to the evidence, the Court held,—

**May 17, 1821.**

**SECOND DIVISION.**

**Lord Pitmilley.**

**B.**

1. That although each burgess might pursue for his individual interest, yet as the action at the instance of the burgesses was raised by them as a body, it must be dismissed, as they were not a corporation; and it was the more irregular, as it concluded for a decree of declarator in favour of all the burgesses, while they were not all pursuers.

2. That while the burgesses had a peculiar and extensive right of possession of the commony, the property of it was in the burgh, and the administration of it in the Magistrates, for the benefit of the burgh.

The Lord Ordinary had decerned generally in favour of the Magistrates, but this was thought too broad, as the Magistrates had not the arbitrary disposal of the property, which must be determined by expediency.

**TOD & ROMANES, W. S.—WM. RENNY, W. S.—Agents.**

No. 16.

WM. HOWDEN and Others.—*Christison*.

Mrs. CRIGHTON,

Competing.

May 18, 1821.

FIRST DIVISION.

Lord Alloway.

D.

*Legacy—Legitim—Jus Relictæ.*—Mr. Howden, by a testament in the English form, after bequeathing an annuity of £100 to his widow, a legacy of £2,000 to his only child, Mrs. Crighton, and certain legacies to his other relations, and nominating executors, left the residue of his estate to his brothers and sisters. Mrs. Crighton was served heir to her father, and succeeded to her mother. In a multiplepinding raised by Mr. Howden's executors, the Lord Ordinary found, ' that Mrs. Crighton, by ' taking up her father's heritage, is not excluded from ' her claim of legitim, she being her father's only ' child: that the legacy not being declared to be in ' lieu of the legitim, may be claimed by her out of ' the dead's part, along with the other legatees: that ' the legitim amounts to one-third of the free execution: that although the £100 a-year to the widow ' might, under the statute 1681, have been held as a ' sufficient exclusion of the terce, if it had been accepted by her, yet that this sum not being declared ' to be in full of her jus relictæ, the widow and her ' representative, (Mrs. Crighton), are not prevented ' from claiming the widow's share of the moveable ' effects; and that Mrs. Crighton, as representative ' of her mother, is entitled to one-third share of these ' effects.'

The Court refused a petition without answers.

WM. HOWISON, Junior—JOHN ELDER, W. S.—*Agents*.

P. GUTHRIE, Pursuer.—*Ferguson*.  
Capt. J. BROWN, Defender.—*A. Wood*.

No. 17.

*Statute—Process.*—By the Edinburgh police-act, 52. Geo. III, c. 172, § 96, no action shall be commenced against the commissioners, &c. ‘for any thing done in ‘the execution of this act, unless *wilful* corruption ‘and oppression be charged.’ In an action of damages raised by Guthrie, a messenger, against Brown, the superintendant of police, the libel bore ‘illegal, ‘unwarrantable, and oppressive procedure towards ‘an officer of the law, in the execution of his duty, ‘and for having illegally, maliciously, and oppressive-ly assaulted, beat, abused, and confined him as a ‘prisoner.’

The Lord Ordinary found the action relevant, and that the charge was virtually a charge of *wilful* oppression; but the Court, ‘in respect that *wilful* oppression is not *directly* charged in the libel, as required by the act,’ altered this judgment, and dismissed the action.

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FIRST DIVISION.

Lord Alloway.

S .

JAS. HAWTHORN—AND. STORIE, W. S.—*Agents*.

H. MUNRO, Suspender.—*Matheson*.  
A. CAMERON, Charger.—*P. Robertson*.

No. 18.

*Cautioner.*—Cameron subset a farm, and Hector Munro signed the sublease as cautioner for the rent. The tenant having become insolvent, and left the farm, Cameron resumed possession, and subset it to another, at an inferior rent, with the consent, as he alleged, of Hector Munro, and under a promise to

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SECOND DIVISION.

Lord Cringletie.

F.



pay the difference between the rents ; but he did not sign the lease as before. For this difference Cameron raised action against Hector, and decree was pronounced in the Sheriff-court against him, on the ground that he was bound to prove the discharge of the cautionary obligation by writ or oath : But in a suspension the Lord Ordinary held that Cameron, by subsetting the farm, had discharged the cautioner : that it was, therefore, incumbent on him to prove Hector's liability, under the new lease which he had not signed ; and a parole proof was held incompetent. To this judgment the Court adhered, by refusing a petition without answers.

V. HATHORN, W. S.—JAS. M'DONNELL, W. S.—Agents.

No. 19. A. WALLACE, (for ARNOT), Pursuer.—*Jardine*.  
D. LISTER, Defender.—*L'Amy—More*.

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Lord Pitmilley.

M'K.

*Compensation—Husband and Wife*.—George Miller and his wife, Margaret Arnot, the pursuer's constituent, entered into a voluntary contract of separation in 1805, by which he agreed, inter alia, that she should enjoy the liferent, and their daughter the fee of any funds which should fall by succession to the wife. Her brother, Peter Arnot, dying in 1817, she and her husband, for his interest, with the other next of kin, were confirmed as his executors ; and, among other things, to a debt due by Lister, the defender. In an action against Lister by Wallace, assignee of Margaret Arnot, for her share of it, he pleaded compensation on a debt due to him by her husband. The Lord Ordinary found, that, as the husband had not revoked the contract of separation, the right of succes-

sion belonged to the wife alone, and repelled the plea of compensation ; but the Court altered this judgment, and found that the contract did not prevent the wife's share of the executry from vesting in the husband ; and, therefore, sustained the compensation.

One Judge observed, that, to exclude the *jus mariti*, the confirmation ought to have been by a trustee for behoof of the wife.

JAS. HERIOT, W. S.—GEO. GORDON,—Agents.

A. WALKER, Pursuer.—*Skene*.

No. 20.

A. DAVIDSON, Defender.—*Greenshields*.

*Cautioner*.—Walker, a partner of Mason, Baird, and Company, having (1st October 1809) sold his share in the concern to Baird, Davidson, the defender, bound himself as cautioner for Baird, to relieve Walker of all claims against him as ‘ a partner of ‘ Mason, Baird, and Company, preceding the said ‘ 1st day of October, or in any manner of way as a ‘ partner of the foresaid concern ;’ and he also, by a corroborative letter, became bound to relieve Walker ‘ of all debts and claims affecting Mason, Baird, and ‘ Company prior to your retiring as a partner of that ‘ company.’ Walker retired privately on the 1st October 1809, but not publicly till the 24th of the same month ; and the company thereafter having become bankrupt, and Walker being found liable for the price of goods contracted for prior to, but not delivered till after the public notification of his retirement, he raised an action of relief against Davidson. He defended himself on the plea, that cautionary obligations being *strictissimi juris*, his obligation could not be extend-

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Lord Cringletie.  
B

ed so as to reach transactions after the 1st of October; and alleged the debt had been contracted subsequently to that date. But the Court thought his obligation sufficient to comprehend all debts exigible from Walker as a partner, and decided accordingly.

JOHN MORISON, W. S.—THOS. LAWSON,—Agents.

No. 21. G. LENNOX and Co., Pursuers.—*Moncreiff—Jameson.*

Mrs. AUCHINCLOSS and Others, Defenders.—*Blackwell.*

May 19, 1821.

FIRST DIVISION.

Lord Gillies.

D.

*Cautioner—Husband and Wife—Mrs. Auchincloss,* having inherited a considerable property from her father and brothers, (which, in her contract of marriage, was excepted from the *jus mariti*), granted a letter of guarantee ‘for any yarn to be furnished’ to her son of a former marriage, to the extent of £1,400; and her husband subjoined, ‘The above is done with my ‘consent.’ In an action against her and the trust-disponees of her husband after his death, the Court held,—1st, That the wife’s obligation was null and ineffectual against her person or estate; and, 2d, That the husband, by merely consenting to the deed of his wife, did not incur responsibility as a principal guarantee.

CAMPBELL & CLASSON, W. S.—GEORGE NAPIER,—Agents.

Mrs. STEWART and Others, Complainers.—*A. Murray.*

No. 22.

D. M'INTYRE, Defender.—

*Factor loco Tutoris.*—On petition and complaint, decree (in absence) against a factor loco tutoris to the children of the late John Stewart, for not lodging any rental or inventory of the estate within six months from the date of the extract of his factory, nor any state of his accounts annually.

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SECOND DIVISION.

B.

M'CHEYNE & M'GLASHAN, W. S.—

—Agents.

PEASE, WRAYS, and TRIGG, Pursuers.—*Cranstoun—Blackwell.*

No. 23.

SMITH and JAMIESON, Defenders.—*Bell—Green-shields.*

*Mandate—Commission.*—This was a case of special circumstances, from which no general point can be deduced. It arose out of a commission accepted by Smith and Jamieson to purchase in Sicily for Pease, Wrays, and Trigg, 1000 quarters of lintseed, at a price not exceeding 65s., delivered in Hull. But being unable, as they alleged, from a rise in the price of the article, and in the rate of freight, to execute the commission at the stipulated price, they shipped 500 quarters at 80s., on which Pease, Wrays, and Trigg realized a considerable profit. The price was paid before the arrival of the invoice; but so soon as it arrived, the latter stated their disapprobation, and their intention to hold Smith and Jamieson liable in damages. Having afterwards raised an action for repetition of the price in so far as it ex-

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FIRST DIVISION.

Lord Gillies.

S.

ceeded their commission, and for damages on account of the full quantity ordered not having been sent, the question came to be, whether Smith and Jamieson could, with ordinary diligence, have executed the commission within the prescribed limits. The Lord Ordinary judging the case on a voluminous correspondence, and a proof by commission, held that they could not have purchased at the limits, and the Court adhered.

JAS. HAY, W. S.—JAMES WEMYSS, W. S.—Agents.

No. 24.

R. OGILVIE and Others, Pursuers.—*Cockburn*.  
The MAGISTRATES of EDINBURGH, Defenders.—*Solicitor-General*.

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FIRST DIVISION.  
Lord Gillies.  
H.

*Implied Obligation*.—Ogilvy and others were underwriters on a vessel, which, having a pilot on board, had been run on a sand-bank in the harbour of Leith. They brought an action of relief against the Magistrates of Edinburgh as proprietors of the harbour; as responsible for the attention and skill of the pilots and harbour-master named by them, and acting under their orders; and drawing (so it was alleged) part of the emoluments. Lord Gillies found the Magistrates liable; but the Court, on advising a petition and answers, together with a joint case sent to London, Liverpool, Hull, and Greenock, with answers from those ports as to the manner of appointing and paying pilots, and the understood freedom from responsibility on the part of those who appointed them, altered; held the Magistrates not liable for the alleged misconduct of the pilot or harbour-master, and dismissed the action.

JOHN MOWBRAY, W. S.—M'RTICHEL & MURRAY, W. S.—Agents.

SIR T. G. CARMICHAEL of Skirling, Bart. Pursuer.

No. 25.

—*Jardine*.

SIR J. C. ANSTRUTHER of Anstruther and Carmichael, Bart. Defender.—*Baird*.

*Warrandice*.—This was an action of relief on the warrandice of a disposition by James Earl of Hyndford, in 1724, whereby he sold the estate of Skirling, with the teinds, (which he warranted), to William Carmichael. The pursuer, Sir T. G. Carmichael, was the heir of William, the disponent. The defender, Sir J. C. Anstruther, was the representative of the Earl of Hyndford.

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Lord Cringletie.

M'K.

The ground of action was eviction by augmentations. The defences were,—1. The action ought to have been against the executors of the Earl of Hyndford. 2. The pursuer's ancestors having failed to pursue an approbation of a subsisting valuation of the teinds by the subcommissioners, which might have afforded a defence against augmentations, the pursuer had lost recourse. 3. That the two estates of Skirling and Carmichael having, posterior to the date of the obligation, belonged to one person, the obligation was then extinguished confusione, although the estates were now in separate persons: And, 4. That as the original disponent, or his heirs, ought to have pursued a valuation of the teinds when they acquired the estate, the warrandice could only extend to the price paid for the teinds. The Lord Ordinary decerned against the defender, and the Court refused a petition without answers.

In a note, the Lord Ordinary stated the grounds of his judgment to be, 1. That the obligation having tractum futuri temporis, was effectual against heirs. 2. That,

holding this obligation, neither the disponent, nor his heirs, had any interest, and were not bound to pursue an approbation or valuation. 3. That there could be no confusion; as, at the time when the estates were in one person, there was no debt existing. None of the Judges dissented.

GIBSON, CHRISTIE, & WARDLAW, W. S.—JOHN KER,—W. S.  
Agents.

No. 26.

W. YOUNG and Others, Pursuers.—*Ivory*.  
D. SMITH, Defender.—*Jardine*.

May 24, 1821.

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Lord Gillies.  
H.

*Expences*.—This was a question of expences, in which the Court altered the Lord Ordinary's judgment, and found Smith, the defender, liable; he having failed to comply with the act of sederunt 12th February 1780; and having delayed to account for his intromissions as curator bonis to a person of whom Young and others were confirmed as executors, till forced to do so in an action of count and reckoning, in most points of which the executors were successful.

JAS. IMRIE—JAS. HERIOT, W. S.—Agents.

No. 27

J. LANG, Pursuer.—*Pyper*.  
J. CAMPBELL, Defender.—*Brownlee*.

May 24, 1821.

FIRST DIVISION  
S.

*Cessio Bonorum*.—The Court refused to give the pursuer decree of cessio bonorum, as a short time before his bankruptcy he had paid large sums of money to his children, (which he alleged were their portions); had transferred his crop and stocking to his brother,

and failed to account for other parts of his property.

GEORGE NAPIER—T. MEGGET, W. S.—Agents.

EDWARDS, &c. Assignee of CLOUGH, MASON, & Co., No. 28.

Pursuers.—*Forsyth.*

J. ADAM, Defender.—*Greenshields.*

*Bill of Exchange—Compensation.*—Adam being pursued by the assignee, under a commission of bankruptcy of Clough, Mason, and Company, bankers in Denbigh, for payment of a bill accepted by him, pleaded compensation, alleging, that the bill was only one of a variety of transactions between him and Clough, Mason, and Company, who had acted as sub-factors to him on certain estates; and that he had raised against them an action of count and reckoning, to ascertain the balance on the accounts, which he said was greatly in his favour. The Lord Ordinary, however, holding that Adam could not plead in compensation his illiquid claims, decerned against him; and the Court adhered.

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Lord Alloway.

H.

MACK & WOTHERSPOON, W. S.—TOD & ROMANES, W. S.—  
Agents.

J. CUNINGHAME and J. BRUNTON, Advocators.—

T. BAILLIE, Respondent.—*Sandford.*

No. 29.

*Prisoner.*—Cuninghame and Brunton, on the liberation from prison of John Morrison on a sick-bill, the debtor of Baillie, granted bond in the usual form to the Magistrates of Edinburgh. Baillie applied to

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B.



the Magistrates for an assignation to the bond, on the ground that it was forfeited. This, though opposed by Cuninghame and Brunton, having been granted, the Court, in an advocacy, found that the pursuer had no title to ask, nor the Magistrates to grant, such an assignation.

The Lord Ordinary had pronounced a special interlocutor, reversing the order of the magistrates, and containing various rationes decidendi, in which some of the Judges said they were not prepared to acquiesce; but as they all agreed that an assignation could not legally be granted, they refused a petition without answers.

T. BAILLIE—Geo. Todd, Jun.—Agents.

No. 30.

W. SCOTT, Petitioner.—*Boswell.*

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FIRST DIVISION.

Lord Succoth.

S.

*Process.*—In a question of accounting between Scott, as factor loco tutoris, and his constituents, which had been long before the Court, certain vouchers, which had been formerly examined and returned without objection, having again been required by the accountant to whom the accounts had been remitted, the Lord Ordinary and the Court held that they must be exhibited,—reserving all question as to the effect of the long silence of the opposite party, if any of those vouchers should now be wanting.

JAS. GREIG, W. S.—Agent.

**J. DEAS, Pursuer.—*Baird—Walker.***

**No. 31.**

**R. AYTOUN and J. BROWN, Defenders.—*M<sup>c</sup>Neill.***

*Submission.*—Deas having certain illiquid claims against Aytoun and Brown, the parties agreed to settle them by submission. On the part of Deas, Mr. Blackwood was proposed as referee, and on that of Aytoun and Brown, Mr. Aitken. A letter of reference was drawn up by Deas, in which Blackwood's name was inserted, and a blank left for the name of the other arbiter. Aytoun and Brown signed the letter, trusting that Aitken's name would be inserted. Another person's name (Boyd) was, however, put in by Deas; which was not discovered till the decree-arbitral had been pronounced. In an action on it by Deas, the Court adhered to the Lord Ordinary's judgment, assoilzieing Aytoun and Brown, 'in respect they did not approve of the appointment of Mr. Boyd as one of the referees, or homologate his acting as one of the referees.'

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**Lord Gillies.**

**H.**

**BROWN & LAWSON, W. S.—YOUNG, AYTOUN, & RUTHERFORD,  
W. S.—Agents.**

**T. MELVILLE, Suspender.—*Bruce.***

**No. 32.**

**J. MELVILLE, Charger.—*Alison.***

*Expences.*—In this case, after considerable litigation, in which Thomas Melville was, in a great measure, unsuccessful, he offered a proof of an allegation, which appearing to the Lord Ordinary to be altogether new, he refused to allow the proof, except on payment of the previous expences. But the Court,

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**Lord Alloway.**

**H.**

holding the allegation implied in one formerly made, altered his judgment.

GEORGE LYON, W. S.—J. W. NESS,—Agents.

No. 33.

J. STEVENSON, Advocate.—*D. M'Farlane.*  
M. and A. M'CULLOCH and D. NIVEN—Respondents.—

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Lord Alloway.

S.

*Landlord and Tenant.*—Stevenson having, as landlord, sequestrated, in August 1819, part of the household furniture of the M'Cullochs for the half-year's rent due at the preceding Whitsunday ; Niven, agent for the tenants, granted a bill, payable 16th September, to Stevenson's agent, for the precise amount of the Whitsunday rent, on an agreement that farther proceedings in the sequestration should be delayed. The bill not being paid when due, the effects were sold. Niven having, however, been imprisoned, paid the bill, and required the proceeds of the sale to be consigned. The question was, whether the landlord could take these proceeds for the *Martinmas* rent ? The inferior court held the bill to have been granted for the Whitsunday rent, for which sequestration had been issued ; and that M'Cullochs and Niven were entitled to the consigned proceeds ; and in an advocacy the Lord Ordinary and the Court affirmed this judgment.

JAS. GREIG, W. S.—J. CRAWFORD, W. S.—Agents.

A. ANDERSON and Others, Suspenders.—*Moncreiff—  
D. M'Farlane.*

No. 34.

P. WOOD and Others, Chargers.—*Forsyth—H. J.  
Robertson.*

*Cautioner—Inhibition.*—Anderson and others, the suspenders, became cautioners in a composition-contract between Alexander Livingstone and his creditors each for a specific sum. Previous to this contract, Wood and others, the chargers, creditors of Livingstone, had raised an action of count and reckoning against him, to ascertain the amount of their debt, on which they raised and executed inhibition; but not having got decree, they ranked in the composition-contract for a random sum, it being agreed that the true amount should be determined by submission. The submission was entered into between them and Livingstone; but the cautioners (Anderson, &c.) were not parties to it. Subsequent to the inhibition, these cautioners received from Livingstone a disposition in security of his heritable property, in which they were in-  
feft. Livingstone was thereafter sequestrated, and discharged by the Court. After having paid two instalments on the random debt, the cautioners suspended a charge for payment of the third, on the ground, inter alia, that the debt not being yet ascertained, might possibly be already overpaid. While this suspension was depending, decree-arbitral was pronounced, ascertaining the true amount of the debt, and the action of count and reckoning was wakened, and decree conform obtained. The chargers, Wood, &c. then raised a reduction ex capite inhibitionis of the disposition granted to the cautioners.

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Lord Glenlee.

B.

In reference to the pleas of the cautioners the Court held,—

1. That the limitation of 1695, c. 5, is not pleadable by cautioners in a composition-contract \* against a creditor whose debt was unliquidated, and consequently, not exigible during the seven years.

2. That where a private composition is succeeded by a sequestration, in which the debtor is discharged, the cautioners for the composition are not liberated; as they might, as contingent creditors, have ranked in the sequestration.

3. That cautioners for a private composition are bound by a decree-arbitral against the principal debtor, ascertaining the amount of the debt, although not called as parties.

4. That such a submission is not evacuated by a subsequent sequestration.

5. That an inhibition on a dependence is not put an end to by a subsequent submission, provided the reference be merely for ascertaining the amount of the inhibitor's debt; and that decree conform in the action on which the inhibition was raised is afterwards pronounced.

6. That a disposition in security to a cautioner in a composition-contract is effectual to the extent of what he has actually paid under the bond of caution, against a creditor-inhibiter, and a party to the contract, but is reducible *ex capite inhibitionis*, to the end that the creditor-inhibiter may be secured in payment of the unpaid balance of the composition.

A. STEELE, W. S.—THOS. JOHNSTONE,—Agents.

\* It was observed that this plea is competent to such cautioners where the debt is liquid.

J. SCOTT, Trustee for the Creditors of Lady Belhaven, Pursuer.—*Clerk—Cunninghame.*

No. 35.

Lord BELHAVEN, Defender.—*Moncreiff—Rutherford.*

*Passive Title.*—Lord Belhaven, on the death of his mother, while no witnesses were present, opened her repositories, which had been sealed up by her friends; burned several of her papers; carried away a miniature picture of his father; his mother's dressing-case; and some other things of small value, part of which he gave away. In an action against him at the instance of his mother's creditors, on the passive titles of gestio pro herede, as having intermeddled with her writings, and vitious intromission, the Court found him liable on the latter.

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Lord Pitmilley.  
F.

Observed, that though the ancient rule as to vitious intromission be much relaxed, yet from all the circumstances, and, particularly, the breaking of the seals, the rule must be enforced.

JOHN M'KENZIE—JAS. DUNDAS, W. S.—Agents.

C. HILL, Pursuer.—*P. Robertson.*

No. 36.

R. GILROY, Defender.—*Fullerton.*

*Interest.*—The mother of a bastard child found entitled to bygone aliment and progressive interest during the father's absence from Scotland. The Lord Ordinary had refused interest; but a majority of the Court held, that though the debt was illiquid, justice

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Lord Pitmilley.  
F.

required, in the special circumstances of this case, that interest should be given.

WM. POLLOCK—HOTCHKIS & TYTLER, W. S.—Agents.

No. 37. A. ALLAN and Others, Suspenders.—*Moncreiff—Skene.*

J. SMITH and Others, Chargers.—*Baird.*

May 26, 1821. *Insurance.*—Allan and others underwrote policies  
 SECOND DIVISION. of insurance on the ship Earl of Fife, from Banff to the  
 Bill-Chamber. Greenland seas, and on her stores. The stores were  
 Lord Meadowbank. warranted 'free of average,' or, according to some of  
 M'K. the policies, 'free of particular sea-average.' The ship  
 was totally lost on the day on which she sailed, but  
 part of the stores were saved. The owners abandoned,  
 but the underwriters refused the abandonment of the  
 stores, or to pay their value, on the ground that there  
 being only a partial loss, they were protected by the  
 warranty. In an action against them, the Judge-  
 Admiral held, that 'as with the wreck of the vessel  
 ' the object in view with respect to the stores was  
 ' frustrated, and that they became unfit for another  
 ' voyage of the same kind,' decerned against them.

A bill of suspension of this judgment having been reported by the Lord Ordinary, the Court refused it; but on a petition and answers they passed the bill to try the question.

D. MURRAY, W. S.—JOHN PEAT,—Agents.

**J. SMITH, W. S. Complainer.**—*Cockburn—Hope.*  
**Lord J. HAY, Respondent.**—*Clerk—Blackwell.*

No. 38.

*Member of Parliament.*—Lord John Hay was infeft in the superiority of the lands of Baro, which were alleged to be rated in the cess-books at £391 6s. 8d., under the general title of ‘Lady Baro’s Lands;’ and which, together with another subject, valued at £12 : 2 : 1, (about which there was no dispute), formed the valuation on which he was inrolled as a freeholder in the county of Haddington. Against his inrolment Mr. Smith presented a petition and complaint, on the ground, that Lord J. Hay had not proved that he was superior of the whole subjects contained in the valuation.

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S.

On inspection of the vassal’s titles, (to which the Court held it competent, in a question of identity, to refer), it was found that the valued rent of £391 6s. 8d. was made up of certain distinct subjects therein named, while the crown-charter and sasine of Lord J. Hay contained only some of those subjects.

The Court held, that he had not produced a sufficient title to the lands contained in the valuation in the cess-books, and ordered his name to be expunged from the roll.

JOHN SMITH, W. S.—JAS. HAY, W. S.—Agents.

**Mrs. GRAHAME, Pursuer.**—*Moncreiff—Hope.*  
**F. GRAHAME, Defender.**—*Jeffrey—Ro. Bell.*

No. 39.

*Res Noviter, &c.*—In an action of reduction of the service of the defender as heir-male under an entail,

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 D.



the defender having been assoilzied, and the judgment being final, the pursuer presented a petition on the ground of *res noviter veniens ad notitiam*, by the discovery of two deeds. The Court, in respect the deeds had existed in the public records prior to the judgment becoming final, dismissed the petition as incompetent.

Observed on the Bench, that, even if there had been no objection as to the competency, the deeds founded on were not sufficient to produce any alteration of the judgment on the merits.

JAS. LYON—JOHN ALISON, W. S.—Agents.

No. 40.

W. CATHIE, Advocate.—*Hutcheson*.

L. SMITH, Respondent.—*D. Dickson*.

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Bill-Chamber.

Lord Meadowbank.

S.

*Semiplena Probatio*.—In a question relative to the paternity of a natural child, the inferior court having allowed a proof, and the oath of the woman in supplement, decerned against Cathie, the alleged father; and the Lord Ordinary refused a bill of advocacy. But the Court holding the proof not *semiplena*, passed the bill.

THOS. SMALL, W. S.—JAS. TOD, W. S.—Agents.

No. 41.

A. CAMPBELL, Pursuer.—*Hunter*.

R. M'CULLOCH and Others, Defenders.—*Forsyth*.

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Lord Pitmilley.

B.

*Expences*.—The raiser of a multiplepinding held not liable to his agent for any part of the expences of the discussion between the competing claimants,

(for one of whom the agent was employed), his sole interest being to pay safely, which the usual interlocutor and consignment secure.

GILSON & OLIPHANT, W. S.—D. FISHER,—Agents.

A. CAMPBELL, Pursuer,—*Hunter*.  
G. GRAY and Others, Defenders.—*Forsyth*.

No. 42.

*Expences—Mandate.*—Held, 1. That a tenant, May 29, 1821.  
raiser of a multiplepoinding, is not liable for the ex-  
pences of having <sup>therein</sup> sequestrated the ~~rent~~ during the  
action. SECOND DIVISION.  
Lord Pitmilley.  
R.

2. That it is a sufficient proof of a mandate to an agent, to the effect of subjecting to payment of the expences, that the party had signed one of the pleadings.

GIBSON & OLIPHANT, W. S.—D. FISHER,—Agents.

A. and J. RUTHERFORD, Pursuers.—*Walker*.  
J. TURNBULL, Defender.—*Fullerton*.

No. 43.

*Testament—Legacy.*—John Rutherford, in the May 30, 1821.  
year 1791, executed a will, which contained the fol-  
lowing clause.—‘ And as to what wordly goods God  
‘ has been pleased to bless me with, my will and mind  
‘ is, that after paying my funeral expences, and what  
‘ debts I may owe, the whole of what may remain to be  
‘ sold and converted into cash, and placed at interest  
‘ on good security, by my executors herein after  
‘ named, the interest to be equally divided between  
‘ my three sisters during their natural lives, and not  
‘ subject to pay any debts contracted by their

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S.

‘ husbands, but to be their sole property, and payable every half year ; that on the decease of either of my sisters, who are, or may marry, and have lawful begotten children, the mother’s share of interest to go to her children equally ; and on either of the children attaining the age of 21 years, then that child’s share of principal and interest shall be paid in proportion to the number of children of my said deceased sister ;—my mind and will is, that, on the decease of all my three sisters, the whole of what may remain shall go equally amongst their lawful children and survivors of them.’

The testator had three sisters, one of whom predeceased him unmarried, and the other two survived him, and had families. The one was married to the defender, Turnbull, the only surviving executor under the will, and had a large family. The other had an only son, the pursuer, John Rutherford, who, with concurrence of his mother, now upwards of 60 years of age, raised the present action, to make the defender account for his intromissions as executor, and pay one-half of the property bequeathed by the will.

The Court held, that the share of the deceased sister lapsed by her predeceasing the testator without children ; and that the pursuer having a vested interest in one-half of the property left, burdened with his mother’s liferent, was entitled to immediate payment of it, on finding security for his mother’s liferent.

JOHN TWEEDIE, W. S.—TOD & ROMANES, W. S.—Agents,

**R. GRIEVE and Others, Pursuers.—Baird.**  
**GORDON and FERBER, Defenders.—Skene—Rutherford.**

No. 44.

*Obligation.*—Gordon and Ferber engaged Grieve and others, as coopers, on a written agreement, 'for one year, at 1s. 4d. per barrel,' which was admitted to imply that the barrels were to be made from *undressed wood*; or with the alternative 'of days wages equal to the average amount of their piece-work when otherwise employed.' Gordon and Ferber having afterwards obtained a quantity of *dressed stave-wood*, proposed to employ the workmen in making it into barrels *at eightpence halfpenny or ninepence per barrel*. The workmen refused to agree, and brought an action for £1 : 4s. a-week, as their average wages, till the expiration of the agreement. The Lord Ordinary and the Court decerned against the employers, though they alleged,—1. That to work from dressed staves at 8½d. or 9d., was, by the custom of the trade, precisely analogous to working from undressed wood at 1s. 4d.; and, 2. That Grieve, &c. had, in the meantime, been earning wages under other employers.

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Lord Alloway.

D.

PETER COUPER, W. S.—M'MILLAN & GRANT,—Agents.

**J. M'ARTHUR, Pursuer.—Gordon—Dick.**  
**R. M'ARTHUR, Defender.—Forsyth—Brodie.**

No. 45.

*Implied Discharge.*—Robert M'Arthur was appointed, in 1803, the attorney of the pursuer, John M'Arthur, on his estate in the West Indies; and he

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Lord Cringletie.

B.

continued to act as such till 1814. According to his instructions, Robert M'Arthur transmitted to the pursuer monthly and annual accounts of the expenditure of the estate, and he drew bills for any balance due to him, which were accepted and paid by the pursuer. In 1814, the defender was removed from his situation, and thereafter the pursuer raised action against him for a general accounting from 1808; but the Court adhered to the Lord Ordinary's judgment, who held, that after such a long and continued acquiescence, he was not entitled to enter into an investigation with the defender as to the expences necessary to be incurred on the estate, and of which he had been duly apprised by the periodical accounts, for the balance of which he had accepted bills; and remitted to an accountant to report as to certain other branches of the accounting.\*

MACKENZIE & INNES, W. S.—FALCONER & JOHNSTON,—Agents.

No. 46.

T. WALLACE, Suspender.—*Fullerton*.

J. MILLER, Junior, Charger.—*Keay*.

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Lord Gillies.

D.

*Process—Presumed Mandate.*—Wallace, trustee on Rattray's sequestrated estate, was sisted as a party in an action depending between the bankrupt and Miller. After various proceedings, decree having been pronounced against Wallace, he suspended a charge on it, on the ground, that the appearance by counsel and agent was without his authority. It was held by the Court, that as the suspender, though in-

\* A petition for Robert M'Arthur, on another part of the case, was superseded till 22d June; for which see No. 106,

formed of the proceedings, had not taken means to disclaim them, the mandate of the advocate appearing for him was to be presumed.\*

JOHN MORISON, W. S.—M'RTCHIE & MURRAY, W. S.—Agents.

The TRUSTEES of Mrs. JANET CORBET, Petitioners.

No. 47.

*Moncreiff—Blackwell, et Alii.*

*Process.*—In this case, (which was long and circumstantial), judgment had been pronounced on a hearing in presence, and the petitioners were, on presenting a short petition, allowed more time than the ordinary reclaiming days to prepare an additional petition, 'but under provision always, that the said additional petition shall be printed, marked, and boxed before the second box-day in the ensuing vacation; and that it shall not otherwise be received by the clerks, nor prevent extract from going out.' The additional petition not having been presented till after the second box-day, the Court refused to receive it.

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H.

CUNNINGHAM & BELL, W. S.—Agents.

\* In an action brought by Wallace against the counsel and agent who conducted the proceedings in his name, Lord Gillies assented the former, holding that an advocate, appearing bona fide for a party at the desire of a practising agent, is not responsible for the consequences of the agent's acting without authority. This judgment was acquiesced in.

No papers on this point, but stated on the authority of the papers in the case above.

No. 48. TRUSTEES of M'DONALD, Pursuers.—*Cunningham—Brown.*

G. MITCHELL, Defender.—*P. Robertson.*

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Lord Gillies.

D.

*Cautioner—Implied Discharge.*—M'Donald was cautioner for M'Barnet's rent, and had a letter of relief from Mitchell, the defender's father. The landlord, on M'Barnet failing to pay, had recourse on M'Donald, who discharged the arrears by indorsing to the landlord a bill drawn by him and accepted by Mitchell. This bill, when due, was retired by Mac-Donald, who afterwards sequestrated, pointed, and sold M'Barnet's stock—sublet the farm to new tenants, to whom he sold, at greatly advanced prices, part of the farming stock, which he had purchased, and for several years took the entire charge of the farm without consulting Mitchell.

In an action of relief brought by M'Donald's trustees against the defender, as representing his father, the Court held that M'Donald, by his conduct, had discharged any obligation come under by Mitchell. They also suspended a charge given by the trustees on the bill paid to the landlord, which had been found in M'Donald's repositories after his death, holding it, in the circumstances of the case, to be paid by the profit drawn on M'Barnet's stock, which Mac-donald had purchased.

D. CAMERON, W. S.—J. S. ROBERTSON, W. S.—Agents,

J. DAVIDSON and Others, Suspenders.—*Matheson*. No. 49.  
SIR B. DUNBAR, Charger.—*Hope*.

*Diligence*.—A charge erroneously given for *eighty* May 31, 1821.  
guineas of expences, on a diligence for *eight* guineas, Bill-Chamber.  
suspended as to the excess, but passed quoad ultra. Lord Craigie.  
B.

JOS. GORDON, W. S.—D. HORNE, W. S.—Agents,

J. W. ROBERTON, Trustee on R. F. ALEXANDER'S No. 50.  
Estate, Pursuer.—*Moncreiff*—*T. H. Miller*.  
A. ALEXANDER and Others, Defenders.—*Jeffrey*—  
*Jameson*.

A question of fact arising out of a contract to May 31, 1821.  
share the loss on goods abroad, of which part had SECOND DIVISION,  
been confiscated, but it was uncertain to which of Lord Meadowbank,  
the parties the confiscated part belonged. The Court M.K.  
found that it belonged to the father of A. Alexander,  
&c. and decerned in their favour.

BALLINGALL & YOUNG, W. S.—THOS. JOHNSTONE,—Agents.

J. RANKINE, Pursuer.—*Greenshields*—*Fletcher*. No. 51.  
W. RANKINE, Defender.—*Jeffrey*—*Monteith*.

*Commissary—Jurisdiction*.—In a reduction, it was May 31, 1821.  
held by the Court, (altering the judgment of the Lord SECOND DIVISION,  
Ordinary), Lord Pitmilley.

1. That a decree cognitionis causa for a debt of  
£200, obtained before the commissary-court of Glas-  
gow, was null, as pronounced by an incompetent  
court.

B.



2. That although this might be cured by prorogation, a pupil without tutors or a curator *ad litem*, cannot prorogate jurisdiction.

3. That although the quadrennium utile was elapsed, the challenge was still competent : And,

4. That an adjudication in absence proceeding on such a decree of constitution was void.\*

The pursuer rested his arguments against the jurisdiction of the commissary chiefly on *Paterson v. Ross*, 1st July 1696 ; Fount. (Mor. 7,579) ; which the defender alleged had been departed from in *Kerr against Calderwood*, 14th February 1706, (Mor. 7,556) ; but it was observed that *Kerr's* case did not infringe on that of *Paterson*, as there had been a prorogation of the jurisdiction.

JAS. ARNOT, W. S.—GEO. NAPIER,—Agents.

No. 52.

J. LIVINGSTONE, Pursuer.—*Erskine*.

D. CLARK, Defender.—*W. R. Robinson*.

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Lord Glenlee.

M'K.

*Clause*.—Andrew Livingstone succeeded to the contiguous estates of Grobdale, Tormollan, and of Slogary, which were vested in him and his predecessors by separate titles, and held of different superiors. Grobdale had anciently been divided from Tormollan and Slogary by a burn : but, prior to Andrew Livingstone's succession, a dike had been built, which cut off from Tormollan, and threw into Grobdale about 300 acres. Andrew Livingstone sold to

\* *Expences—Poor*.—The auditor refused the pursuer the expences of getting on the poor's roll ; but the Court awarded them, on the precedent *Cameron*, 25th June 1814 ; Fac. Coll. No papers on this point.

James Livingstone, the pursuer, ' all and whole the  
 ' two and half-merk land of Grobdale, with the  
 ' teinds, woods, and pertinents thereof, lying in the  
 ' parish of Balmaghie and stewartry of Kirkcud-  
 ' bright, declaring the march or boundary betwixt  
 ' the said lands and the lands of Tormollan to be  
 ' the present dike running from at or near Lochan-  
 ' breck Loch to the march of Slogary, together with  
 ' all right, title,' &c. and he was duly infeft on the  
 lands of Grobdale. Thereafter Andrew Livingstone  
 disposed to David Clark, the defender, ' all and  
 ' whole the two merk land of Tormollan, and six-  
 ' teen shilling and eight penny land of Slogary, with  
 ' the teinds, woods, and pertinents thereof;' and he  
 was infeft. The question was, Whether the declar-  
 ation relative to the boundary of Grobdale in James  
 Livingstone's disposition, and inserted in these titles  
 for the first time, was sufficient to extend the bound-  
 ary of Grobdale? or whether the 300 acres there-  
 by cut off from Tormollan belonged to Clark? The  
 Court held that Livingstone's disposition did not  
 convey to him any feudal title to the ground, which  
 was vested in the defender, Clark, by his titles.

TOD & WRIGHT, W. S.—CARNEGIE & SHEPHERD, W. S.—Agents.

H. M'LACHLAN, Pursuer.—*Jameson.*

No. 53.

J. J. M'LACHLAN, Defender.—*Greenshields.*

*Obligation—Writ.*—M'Lachlan addressed a letter  
 to his brother, containing the following clause.—' My  
 ' fortune at present will not allow me to settle more  
 ' on my sisters than L.20 a-year each, for which I

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H.

‘ will give what I believe you call a bond of provision. To you I am under more obligations than I can ever repay. My funds in this country being nearly exhausted, I cannot come forward in the way I should wish, but I will give you two bonds for £250 each, payable in two and four years, (to give time for my property to be sold and remitted to this country), as a small consideration for your having had nearly the whole burden of supporting our aged parents and sisters for so many years, as a mark of sincere esteem for your private worth, and affection for you as a brother.’

In an action raised for implement of the provisions in this letter, no formal deeds having ever been granted, the defender was held liable, and decree pronounced against him accordingly.

D. BROWN, W. S.—COLL M'DONALD, W. S.—Agents.

No. 54. TRUSTEES of J. HAGART, Esq. Advocate, Pursuers.—  
*Clerk—Cranstoun—Thomson—Jeffrey—Skene.*  
 The Right Honourable C. HOPE, Defender.—*Solicitor-General—Cockburn—M'Kenzie.*

June 1, 1821. *Jurisdiction.*—An action of damages against a Judge of the Court of Session, for words spoken in the course of administering justice, censuring the conduct of an advocate in a case then before the Judge, and also for words used on the same occasion, censuring his general conduct as a practitioner, and alleged to have been spoken maliciously, dismissed as incompetent.

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Observed on the Bench, that the responsibility of a Su-

preme Judge seems to be only to Parliament, or to the King in Council.

DONALDSON & RAMSAY, W. S.—JAS. HOPE, W. S.—Agents.

J. LYON, (for GRANT), Pursuer.—*Moncreiff*.

No. 55.

A. M'KLEW, Defender.—*Solicitor-General*.

*Life-Insurance*.—Mr. Grant, for a sum of £2,200, granted a redeemable bond of annuity of £321 to Mr. M'Klew. No mention was made of insurance in the deed of annuity; but Mr. M'Klew insured Mr. Grant's life, and afterwards sold the policy to the insurance-office. Mr. Grant availed himself of the power to redeem, and insisted to have allowance for the price received for the policy, which being refused, he assigned his claim to Mr. Lyon, who raised action for the price. The Court assolizied the defender.

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B.

JAS. GRANT, W. S.—CARLYLE BELL, W. S.—Agents.

J. WRMYSS, Pursuer.—*Cranstoun—Skene—Walker et Alii*.

No. 56.

H. HAY, Defender.—*Solicitor-General—Moncreiff et Alii*.

*Clause—Writ*.—This was a reduction of an entail, on the ground that the testing clause was informal, as,  
1. It wanted the place and date of signing: 2. It did not mention the names and designations of the witnesses. The clause was in these terms.—‘In witness whereof, (written on this and the eleven preceding pages of stamp paper by David Fraser, writer in St. Andrews), I have subscribed these presents, consist-

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‘ ing of this and the said eleven preceding pages, and  
 ‘ marginal note on the fourth page, and to the de-  
 ‘ leting of part of a word on the ninth line, and an-  
 ‘ other part of the said word in the tenth line of the  
 ‘ fifth page, counting from the bottom, before signing,  
 ‘ John Bower, son to Patrick Bower, bookseller in  
 ‘ St. Andrews, and the saids Patrick Bower and  
 ‘ David Fraser. JOHN HAY. *John Bower*, witness.  
 ‘ *Patrick Bower*, witness. *David Fraser*, witness.’

The Lord Ordinary repelled the first of the above reasons simpliciter, and the second, ‘ in respect the  
 ‘ designation of these persons is given in the testing  
 ‘ clause, and that each of them adjects the word  
 “ witness’ to his subscription.’ And to this inter-  
 locutor the Court, after a hearing in presence before  
 all the Judges, and after contrary judgments, ultimately adhered.

THOS. WALKER—CAMPBELL & ARNOT, W. S.—Agents.

No. 57.

M. ROBERTSON, Pursuer.—*Baird*.

P. LYON, Defender.—*Forsyth—Moncreiff*.

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*Husband and Wife*.—An action against Alexander Grant having been transferred, on his death, against his daughter, the wife of P. Lyon, the defender, and him for his interest; and she dying during the dependence, Lyon craved absolvitor. He was held liable in quantum lucratus, and a remit made to the Lord Ordinary to ascertain the fact.

F. FRASER—JAS. GRANT, W. S.—Agents.

J. BAILLIE, Suspender.—*D. M'Farlane.*

No. 58.

R. SMELLIE, Charger.—*Jameson—Gillies.*

*Bill of Exchange.*—Baillie having been imprisoned for payment of a bill of exchange, raised an action of suspension and liberation, on the ground that the bill, though indorsed to Smellie, was held by him in trust; in proof of which he founded on Smellie's acknowledgment, subjoined to a list of bills, 'for which I shall account, agreeably to justice.' The question turned on the import and effect of this acknowledgment. And after an investigation and report by an accountant, the Court suspended the letters simplifier, and decerned.

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J. PATISON, Junior, W. S.—N. W. ROBERTSON,—Agents.

BEATON and M'ANDREW, Pursuers.—*Rutherford.*  
MAJOR A. M'DONALD and his SON, Defenders.—  
*Forsyth.*

No. 59

*Adjudication—Spes Successionis.*—Beaton and M'Andrew, creditors of Alexander M'Donald, younger, of Vallay, raised an adjudication against him on the act 1672, c. 19, 'of such parts and portions of the lands under written, with all right, title, and interest which the said Alexander M'Donald, younger, of Vallay, has, or may claim, or have right thereto, as heir-apparent, male, of line, of conquest, of provision, or otherwise, of the said Alexander M'Donald, senior, of Vallay, his father.' The object of this action was to adjudge the spes successionis of the son; but the lands described in

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S.

the summons belonged to the father, who was a lunatic, and who, by his factor loco tutoris, opposed the adjudication. The Lord Ordinary dismissed the action as incompetent, 'in respect that although Alexander M'Donald is the eldest son of his father, there is no right vested in him as his heir-apparent, and which right does not open till after his father's death; and in respect that this proceeding is altogether new, in so far as the Lord Ordinary knows, in the law of Scotland, in which there has been no previous attempt made to adjudge a spes successionis.' To this judgment the Court adhered.

*Æ. M'BEAN, W. S.—J. M'KENZIE,—Agents.*

No. 60.

W. HIGGINS, Pursuer.—*J. Tait.*  
C. BOYD and Others, Defenders.—*Forsyth.*

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*Tutor and Curator.*—The maternal uncle, being the nearest cognate, found entitled to the custody of an orphan pupil in preference to the tutor-at-law or the father's sister.

TOD & WRIGHT, W. S.—D. FISHER,—Agents.

No. 61.

MRS. DEMPSTER GUTHRIE, Pursuer.—*R. Robinson.*  
A. DUNBAR, Defender.—*Jameson.*

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*Donation—Loan.*—The defender, Dunbar, obtained from his sister, the pursuer, a sum of money, which, it was proved, both by his admission and his writ, that, at the time of the advance, he considered as a loan. He afterwards resisted payment, on the ground that some expressions in the pursuer's letters implied her

intention of converting it into a gift. The Court held, that, in the circumstances of the case, a donation could not be presumed, and decerned against the defender.

INGLIS & WEIR, W. S.—STEVENSON & SCOTT, W. S.—Agents.

GREGSON'S TRUSTEES, Pursuers.—

No. 62.

RUTHERFORD'S TRUSTEES, Defenders.—*R. Bell.*

In this case, the sole point in dispute was, Whether an accountant, to whom the case had been remitted, had correctly charged Rutherford's trustees with the half year's rent of a farm of which Rutherford had been tenant? The Court found that he had, and decerned accordingly.

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TURNBULL, MOLLE, & BROWN, W. S.—GEORGE VEITCH, W. S.—  
Agents.

W. ELLIOT, Pursuer.—*Baird.*

No. 63.

SIR J. L. JOHNSTONE'S TRUSTEES, Defenders.—*Clerk*  
—*Fullerton.*

*Process.*—Elliot raised an action against Sir J. L. Johnstone's trustees, concluding, that they should be ordained to name a sworn measurer to inspect and value, along with one named by him, certain buildings which he had erected for the constituent of the defenders, and for decree according to their report; or otherwise for £3,300. After hearing parties, the Lord Ordinary, before answer, remitted to valuator, who reported the value to be £3,913. Thereafter an amendment of the libel was given in, to meet the

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report, which was allowed to be received and seen; and decree was pronounced in terms of it; but the usual interlocutor, admitting it as part of the libel, was never pronounced. Two representations to the Lord Ordinary, and a petition to the Court, were presented against the decree; but no objection was there made to the competency of the amendment. After, however, the case had been remitted back to the Lord Ordinary, the amendment was objected to as incompetent. The Lord Ordinary, in these circumstances, found that the defenders, 'who were allowed to see the amendment, but did not at that time offer any objection in point of form to its being received, cannot now be permitted to urge this formal objection;' and the Court adhered.

One Judge thought that, under the first conclusion, an amendment was not necessary; but the other Judges dissented. All agreed, that, except for the conduct of the defenders, which barred them from objecting to it, the amendment was incompetent, the report of the valuers being equivalent to a proof.

M. SANDILANDS, W. S.—DALLAS, INNES, & HOGARTH, W. S.—  
Agents.

No. 64.

W. BRODIE and Others, Pursuers.—*Rutherford*.  
W. BRODIE, Defender.—*Clephane*.

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*Advocation—Statute 50. Geo. III, c. 112.*—This was a question as to the competency of an advocacy of a judgment of the Sheriff, in an action of exoneration and relief by William Brodie and others, as tutors and curators to the defender, William Brodie. The Sheriff, after finding the tutors en-

titled to give up their office ; laying down certain principles to regulate the accounting ; allowing some articles in their accounts, and refusing others, found no expences due : But he had pronounced no judgment as to the balance owing by the tutors ; as to the terms of the discharge to be granted by the minor : nor on certain other points in dispute between the parties. In these circumstances, the Court dismissed the advocacy, ‘ as well in respect of the incompetency of the advocacy, as because the claims insisted upon in the action of relief are competent to be discussed, and ought to be discussed before the Sheriff.’

Though the Judges were unanimous in deciding the above case, yet they were not agreed as to what was the test of a judgment being final. Some thought it was the power of extracting a decree, so as to give a charge ; while others considered the opinion said to have been expressed by Lord Robertson, in *Stewart v. Cochrane and Bain*, 28th January 1814, ‘ that no decree was final unless execution could pass on it,’ too broad.

JAS. CRAWFURD, W. S.—CUNNINGHAM & BELL, W. S.—Agents.

WALLACE, HAMILTON, and Co., Pursuers.—*More.* No. 65.  
C. CAMPBELL, Trustee on HAMILTON and Co.’s Estate, Defender.—*Rutherford.*

*Competition—Society—Bankrupt.*—Hugh Hamilton, the managing partner of Hamilton and Co., was bound by the contract of copartnery not to enter into any private adventures. He, however, engaged in a joint adventure with Boyd Dunlop

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and Co., in which he employed the funds and credit of Hamilton and Co. Boyd Dunlop and Co. granted to Wallace, Hamilton, and Co. an assignation to a debt due to them; and Hamilton and Co. having become bankrupt, Campbell, their trustee, executed an arrestment of the same debt, prior to the intimation of the assignation. A competition arising in a multiplepinding between Wallace, Hamilton, and Co. and Campbell for this debt, the question came to be, Whether, in the circumstances, Hamilton and Co. were creditors of Boyd Dunlop and Co.? Campbell maintained that they were creditors,—1st, On the general principle, that acquisitions made by a partner with the funds of a company belong to that company: 2d, That Boyd Dunlop and Co. participated with Hugh Hamilton in his attempt to defraud Hamilton and Co.; and, 3d, That, at all events, Boyd Dunlop and Co. were to be considered as the trustees of Hugh Hamilton, who had ordered them to hold his funds for behoof of Hamilton and Co. The Court, on the ground that the funds and credit of Hamilton and Co. had been employed by Hugh Hamilton in the joint adventure, preferred Campbell, the trustee.

It was also held, that dividends payable from a sequestrated estate, on bills which have been ranked, are not afterwards transmissible by indorsation of the bills, but by assignation only.

HILL & HOPKIRK, W. S.—MACMILLAN & GRANT,—Agents.

J. Dove, Petitioner.—*D. M'Farlane.*

No. 66.

*Bankrupt.*—A petition for a personal protection under the bankrupt statute refused, in respect two years had elapsed from the date of sequestration.

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THOS. JOHNSTONE,—Agent.

W. KEITH, Factor for the Creditors of the York-Buildings Company, Pursuer.—*Clerk—Cranstoun—A. Wood.*

No. 67.

J. and G. TAYLORS, Defenders.—*Jeffrey—Moncreiff—Cockburn—Ro. Bell.*

\* *Retention—Fraud.*—Mackelcan, a creditor of the York-Buildings Company, limited his claim under the *Restrictive Agreement* (see Note below) to £720,

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\* To understand this and the three following cases, of which the pleadings are very voluminous, it is necessary to state generally, that the York-Buildings Company having become insolvent, an agreement, called the *Crown and Anchor* agreement, was attempted between the company and its creditors, by which the creditors were to accept a composition in full payment of their debts, which they were to assign to the company; but this failed. Thereafter, the *General Agreement* was accomplished, by which the company conveyed all its estates to the creditors, and received a discharge from them; the company and creditors entering into a submission to settle the details of the agreement; and the creditors among themselves to determine the amount, validity, and priority of their respective debts. In order to an immediate division of the fund in medio, and to prevent litigation, many of the creditors entered into what was termed the *Restrictive Agreement*, by which, laying aside all claim of priority among themselves, each creditor restricted his debt to a modified sum,—his debt being, however, to be stated at its full amount, and ranked according

which was afterwards sustained by the arbiters for £2,892 : 16 : 8. Taylor, father of the defenders, agent for the Restrictive creditors, uplifted and transmitted this last sum to Loyd, their attorney in London, for their behoof, although Taylor knew that, in fact, Mackelcan's debt had been discharged. The factor for the creditors *in general* having raised action against the defenders, as representing their father, for restitution of the above sum *ex capite fraudis*, they pleaded retention against those creditors who were parties to the *Restrictive Agreement*, on the ground, that they were bound to repeat the sum sued for, which had been uplifted and transmitted for their behoof, and from which they had drawn a dividend. The Court repelled the plea, as the Restrictive creditors were not parties to the action *qua* such; and that money unduly taken from the common fund must *ante omnia* be restored.

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cording to its priority, as ascertained by the arbiters, against all the creditors not parties to the *Restrictive Agreement*; to the effect, 1st, Of drawing funds for payment of his composition; and, 2d, Of forming a surplus-fund for securing the payment of the composition of the other Restrictive Creditors. Mr. Loyd, (now bankrupt), in England, and the late John Taylor, W. S. in Scotland, were attornies particularly for the *Restrictive* creditors, and also for several of the other creditors. After Taylor's death, it was discovered that these attornies were accountable to the creditors for large sums of money; and actions were, accordingly, raised against Mr. Taylor's representatives for payment of his debts.

YORK-BUILDINGS COMPANY'S CREDITORS, Pursuers.

No. 68.

—Clerk—Cranstoun—A. Wood.

J. TAYLOR, Defender.—Jeffrey—Moncreiff—Cockburn—Ro. Bell.

*Retention—Agent and Client.*—A multiplepinding having been raised by that class of the creditors of the York-Buildings Company called the Restrictive creditors, (see Note, p. 55), in name of Taylor, as representing his late father, their agent in Scotland, to account for money received by him on their behoof, and for the purpose of settling their respective interests, Taylor pleaded retention, 1. Of 10 per cent. on the money so received by his father, as commission, and for trouble, which he alleged (but this was denied) had been the agreed-on mode of paying him, or, at least, was the most expedient mode in the circumstances; and, 2. Of a sum paid by him, under a guarantee, for behoof of the creditors.\* The creditors did not object to the latter, nor to a per centage on the business done for them as a body; but insisted, that for business done for them individually, an account of it should be rendered and paid by each creditor; and the Court found accordingly.

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\* Retention on three other grounds was claimed; but on these the Court pronounced no judgment, remitting them simply to the Lord Ordinary.

No. 69. S. LONG, Pursuer.—*Clerk—Cranstoun—A. Wood.*  
 J. TAYLOR, Defender.—*Jeffrey—Moncreiff—Cock-  
 burn—Ro. Bell.*

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*Fraud—Agent and Client.*—Taylor received an assignation from Cross to his debt against the York-Buildings Company at a small price; but subsequently the debt becoming unexpectedly very valuable, and in consequence of other circumstances, Taylor intimated to Cross that he held the debt in trust for him. Cross was ranked on the Restrictive agreement (see Note, p. 55) for £950; and sometime thereafter, Taylor, as his agent, obtained a warrant, under the submission, on the funds of the estate for £1,000. He then wrote to Cross, informing him that he had got a warrant for a sum a little exceeding the restricted sum; and he left it to him to say what he would allow for 'expence and trouble in bringing the business to such a fortunate issue, and at such a risk, expence, and trouble.' Cross's account, as appearing in Taylor's books, was only £18 : 5s.; but this was not laid before him; and he discharged Taylor, on payment of £500, allowing the rest for trouble and expence. Long, his heir, brought a reduction of this discharge; and the Court, considering that Cross had been misled, that the real state of matters had not been disclosed to him, and, in particular, that the account of expences had not been laid before him, decreed in the reduction.

A. SWINTON, W. S.—JO. MORISON, W. S.—Agents.

MANSHIP'S EXECUTORS, Pursuers.—*Clerk—Cranstoun—A. Wood.*

No. 70.

J. TAYLOR, Defender.—*Jeffrey—Moncreiff—Cockburn—Ro. Bell.*

*Trust.*—Among the creditors of the York-Buildings Company was a class called the *Judgment creditors*, from holding bonds with judgments on them by the courts of Westminster Hall; and of those the late Mr. Manship was one. Having sold his bond to the late Mr. Taylor, it unexpectedly became much more valuable than had been contemplated. The executors of Manship brought an action of declarator of trust and accounting against the defender, as representing his father, the late Mr. Taylor, in which they established, that, on the great increase in value of the bond being discovered, Taylor admitted that he held it in trust for Manship. The defender, after in vain contending that his father was not a trustee, endeavoured to show that he was trustee to a certain extent only, and claimed retention of ten per cent, for his expences; but the Court repelled these pleas.

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A. SWINTON, W. S.—JO. MORISON, W. S.—Agents,

A. SWINTON, W. S. Pursuer.—*Clerk—Cranstoun—A. Wood.*

No. 71.

J. and G. TAYLOR, Defenders.—*Jeffrey—Moncreiff—Cockburn—Ro. Bell.*

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*Verbal Injury.*—In a pamphlet addressed to the creditors of the York-Buildings Company, Swinton hav-

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ing made some reflections against the character of the father of the defenders, they presented a petition and complaint to the Court against him, in which they described him in terms highly defamatory. Swinton raised an action of damages, founding on the defamatory words, on malice, and on the petition having been distributed extrajudicially.

The Court, considering, that although used in judicio, yet, as the words were not pertinent to the cause, found the action relevant, and remitted it to the Jury Court.

It was agreed on the Bench, that this was quite unlike the case of Davidson against Megget, 12th May 1821, No. 2.

A. SWINTON, W. S.—JO. MORISON, W. S.—Agents.

No. 72.

O'REILLY, HILL, MAY, and Co. Suspenders.  
W. JEFFRAY, Trustee for JAMIESON'S CREDITORS,  
Chargers.—*Greenshields*.

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*Agent—Mandate—Consignment Abroad.*—Jamieson consigned certain shipments of goods to O'Reilly, Hill, May, and Co., for the purpose of being sold in Jamaica, but without giving any particular directions as to the price at which they should be sold. O'Reilly, Hill, May, and Co., after retaining the goods for several years, without being able to effect a sale, at last sold them at one-third of the invoice-price, being the highest rate then given in the market. In an action of damages brought against them for selling at such a reduced price, the Court found, that as they had done what they considered best for their employers, they had not exceeded the discre-

tionary powers with which, as consignees at a distance, and without instructions, they must be held to have been invested.

J. R. SKINNER, W. S.—

—Agents.

O'REILLY, HILL, MAY, and Co., Suspenders.  
W. and J. WATSONS and Co., Chargers.—*Green-shields.*

No. 73.

*Agent—Mandate—Consignment Abroad.*—The circumstances in this case being the same as those in the preceding, the Court pronounced a similar decision, refusing in both cases a petition against the Lord Ordinary's judgment without answers.

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J. R. SKINNER, W. S.—

—Agents.

J. DUNCAN, Pursuer.—*D. M'Farlane.*  
T. SIME, Defender.—*Clephane.*

No. 74.

*Cessio Bonorum.*—The Court refused the benefit of a cessio bonorum to an English bankrupt imprisoned in Scotland, against whom a commission of bankruptcy had been previously issued in England, the proceedings in which had not terminated.

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JAS. GREIG, W. S.—THOS. WALKER, W. S.—Agents.

J. M'LAINE, Pursuer.—*Burnett*

No. 75.

*Cessio Bonorum.*—The pursuer, after being imprisoned 14 days, was liberated on a sick-bill, under

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which he remained in custody more than a month. He was found entitled to decree of *cessio bonorum*.

The pursuer was allowed aliment on the act of grace while at large on the sick-bill, and was at last discharged from custody on a protestation for not lodging it. This was considered on the Bench as novel and extraordinary.

D. & R. BLAKIE, W. S.—Agents.

- No. 76. W. HOLDEN, for COMMISSIONERS of EXCHEQUER, Petitioner.—*Hope*.  
P. M'FARLANE, TRUSTEE for MACKIE'S CREDITORS, Respondent.—*Matheson*.

June 9, 1821. *Statute—Bankrupt*.—Mackie, cautioner for Kelly for repayment of certain Exchequer-bills, became bankrupt before the bills fell due; and, in terms of the statutes under which these bills were issued, the Court granted warrant on the trustee on Mackie's estate instantly to pay the amount of them, reserving all claims preferable by the law of Scotland.

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D. HORNE, W. S.—JOS. GORDON, W. S.—Agents.

- No. 77. Rev. Dr. W. TAYLOR and Others, TRUSTEES of A. SOMMERVILLE, Pursuers.—*Greenshields—Jameson*.  
M. M'KECHNIE and Others, Defenders.—*Jeffrey—Rutherford*.

June 9, 1821. *Expences*.—Various points in this case having been decided by the Lord Ordinary against the pursuers, they reclaimed to the Court, who altered the Lord

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Ordinary's judgment on one of the points, and remitted to him to hear parties 'with regard to the remaining points of the cause,' but no mention was made of expences. The Lord Ordinary thereafter decided in favour of the pursuers, but refused to allow expences prior to the date of the interlocutor of the Inner House, on the principle of *Falconer*, 4th March 1815. But the Court found, that, in the circumstances of this case, the Lord Ordinary was not precluded from giving expences, and remitted to him to hear parties on them.

One Judge observed, that the terms of the remit to the Lord Ordinary included the point of expences;—another, that although it be incompetent to apply to the Lord Ordinary for expences which have not been allowed by the Court, where there has been a decision exhausting the cause, yet as here only one out of many points had been decided, the Court was not then in a situation to determine on the question of expences.

TENNANT & LYON, W. S.—

—Agents.

W. FULTON and J. KIBBLE, Complainers.—  
*Blackwell.*

No. 78.

J. CRUM, Respondent.—*Moncreiff—Fullerton—  
Cathcart.*

*Member of Parliament—Freehold Qualification.*—  
Mr. Crum was inrolled by the freeholders of Renfrewshire inter alia on a crown-charter and sasine of the lands of Tors, and a retour of lands of the same name, dated 9th December 1658, it being stated in the charter and sasine that Mr. Crum's lands were retoured of that date. In a petition and complaint against

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his inrolment, it was objected, that there were two distinct subjects in the same parish known by the name of Tors, only one of which was retoured, and proof was offered to shew that Mr. Crum was not superior of the subject to which the retour applied. The Court held the identity of the lands in the charter and retour to be sufficiently established, and refused to allow, as incompetent, any discussion of Mr. Crum's progress.

ALEX. PEARSON, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.  
Agents.

No. 79.

D. DONALD, Suspender.—*Ivory*.

D. DICK, Charger.—*M'Farlan*.

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*Fraud—Restitution*.—Jameson bought a quantity of cloth, for the price of which he, along with Black, granted bill, which was indorsed by the suspender, Donald, and discounted with the charger, Dick. The cloth having been sent to Black's printing-field to be printed, and Black and Jameson becoming insolvent, the suspender, Donald, clandestinely, but with the sanction of Black, carried the cloth from the printfield to Dick, sold it, and paid the proceeds to Dick to account of the bill. Jameson, after having been sequestrated and discharged, raised an action of restitution, or of payment, of the cloth, against Donald and Dick; and, having got decree against them, Dick paid the debt, and obtained an assignation to the decree, on which he charged Donald. In a suspension, Donald pleaded against Dick, as assignee of Jameson,—1. That Jameson had no title to pursue, as he had been sequestrated subsequently to

the above transaction, and, although discharged, this claim had not been specifically reconveyed to him. 2. That Black having been a creditor of Jameson, he had a lien over the cloth which extended to the price; and as it had been paid away for his behoof, and with his sanction, it formed a set-off to this claim. The Lord Ordinary being satisfied that the cloth had been fraudulently disposed of, repelled the reasons of suspension; and the Court adhered.

JAS. MALCOLM—TOD & WRIGHT, W. S.—Agents.

J. HUTCHINSON.—*Clerk*—J. Wilson, jun.

No. 80.

J. LIDDLE.—*More*.

Competing.

*Bankrupt—Trustee—Process.*—Hutchinson, Liddle, and M'Dowall each presented petitions to be confirmed trustee on a sequestrated estate; but the Court holding the proceedings at the election to have been irregular, refused all the petitions, annulled the election, and ordered a new one. M'Dowall retired from the contest; Hutchinson reclaimed, and Liddle (without reclaiming) answered his petition; the judgment thus becoming final in regard to all, except Hutchinson, who had now no competitor, the Court repelled the objections formerly sustained, and confirmed him trustee.

June 13, 1821.

FIRST DIVISION.

D.

D. SCOTT, W. S.—J. LIDDLE,—Agents.

No. 81.

J. M'PHAIL, Pursuer.—*P. Robertson.*D. CLARK and A. SMITH, Defenders.—*Moré.*

June 13, 1821.

FIRST DIVISION.

Lord Alloway.

D.

*Joint Obligation—Novatio Debiti.*—Clark and Smith, 'as sureties and full debtors' with A. Clark, a bankrupt, granted bond for a composition, payable by instalments on the 6th November 1813 and 6th August 1814. M'Phail, who was a creditor, got partial payments, and gave indulgence to the bankrupt till 1st December 1815 for the balance. In an action against Clark and Smith, and in reference to their defences, the Lord Ordinary, 'in respect there was no novation of the debt, nor a discharge, and the defenders are bound, conjunctly and severally, both as sureties and as full debtors,' decreed against them; and the Court adhered.

JAS. S. ROBERTSON, W. S.—JAS. FREDIE, W. S.—Agents.

No. 82.

BERRY and FORSYTH, Trustee on FRASER'S Estate, Pursuers.—*Forsyth—Jeffrey.*J. and A. ANDERSON, Defenders.—*Greenshields—Moncreiff.*

June 13, 1821.

SECOND DIVISION.

Lord Pitmilley.

F.

This was an action of reduction of a promissory-note, and an heritable security granted by James Fraser, and of a decree in absence, and inhibition against him, for certain debts said to be due by his father, to whom, as heir, he had succeeded in an heritable estate. The promissory-note and heritable security were said to have been the result of a settlement with Fraser, who, however, was alleged to be facile. The Lord Ordinary reduced in terms of the libel, except as to a sum lent to Fraser himself, in respect of various circumstances, but especially that

no detail of the alleged debt had been laid before Fraser, nor any attempt made to settle with or constitute it against the executors of his father, one of whom was a partner of Anderson's firm when the security was got; and that another party was primarily liable for the debts, between whom and the defenders accounts were yet unsettled, and who was not a party to this action.

BERRY & HESCHE, W. S.—Geo. DUNLOP, W. S.—Agents.

W. ARROL, Suspender.—*Pyper.*

G. MARSHALL, Charger.—*More.*

No. 83.

*Bill of Exchange—Proof—Indorsee.*—Arrol suspended a charge given by Marshall, the indorsee, on a bill of exchange, on the grounds, 1st, That the bill was granted for an illegal cause, being intended to create a preference to a favourite creditor; and, 2d, That this circumstance was known to the charger, who was a collusive indorsee. The first ground of suspension was proved by the writ of the preferred creditor; and in support of the second (which was almost completely established by the circumstances of the case) a parole proof was offered. The Court, however, refused to allow a proof of mala fides otherwise than by writ or oath.\*

June 14, 1821.

FIRST DIVISION.

Bill-Chamber.

Lord Meadowbank.

H.

JOHN GIBSON, W. S.—C. J. F. ORR, W. S.—Agents.

\* The suspender afterwards referred the second objection to the charger's oath.



No. 84.

W. IRVING, Pursuer.—*Jeffrey—Maitland.*  
 MRS. SWEETMAN, Defender.—*Murray.*

June 14, 1821.

SECOND DIVISION.

Lord Pitmilley.

F.

*Repetition.*—Mrs. Sweetman obtained decree in absence against Irving for a certain debt, and a regular settlement took place. Irving thereafter raised action of reduction and repetition against Mrs. Sweetman, founding on documents which he alleged showed that no debt was due; but the Lord Ordinary and the Court being satisfied that he had the documents in his possession at the time of the settlement, and that they did not afford legal evidence that the debt was not due, assolizied the defender.\*

T. CORRIE & D. WELSH, W. S.—A. GOLDIE, W. S.—Agents.

No. 85.

BELL and Co. Pursuers.—*Cuninghame.*

JOHNSTON and WIGHT, Defenders.—*Solicitor-General*  
*—Rutherford.*

June 15, 1821.

FIRST DIVISION.

Lord Alloway.

H.

*Charter-Party—Demurrage.*—In this case the Court decided, 1<sup>st</sup>, That a merchant freighting a ship was liable for demurrage ‘during the whole period of the ship’s detention (a winter) from and after the expiration of the stipulated lay-days;’ the lay-days having expired on the 23<sup>d</sup> December, after which time no vessels appeared to have sailed from the port on account of the ice; and, 2<sup>d</sup>, That the rate of demurrage stipulated in the charter-party was the rule to be followed, it being nowise excessive.

J. & W. JOLLIE, W. S.—W. COOK, W. S.—Agents.

\* Irving referred his allegation to the oath of Mrs. Sweetman.

J. M'CALLY, Pursuer.—*Menzies*.

No. 86.

J. INGLIS, Defender.—*M'Kenzie*.

*Writ—Husband and Wife—Fiar.*—George Dawson, who was unable to write, executed by notaries a disposition of a small property to his daughter, and her husband, John M'Cally, in conjunct fee and life-rent, and the longest liver of them, and their heirs and assignees. The deed was not delivered till after his death, when it was recorded, and sasine taken. In the meanwhile, another deed made its appearance, on which sasine had been taken prior to that in favour of M'Cally, purporting to be a subsequent disposition by Dawson to his son, Robert. But this was suspicious and irregular, being subscribed only with certain illegible marks, said to be the initials of the granter, the authenticity of which was not supported by any other writings; the writer not being named; the subscriptions of both witnesses (now said to be dead) appearing to be written by the same hand; and their designations being inserted on an erasure. These deeds had been the subject of a reference by Robert Dawson, and M'Cally, the husband, to which the wife was no party, and Robert was preferred. Robert conveyed the subject to Inglis, but prescription had not run in favour of either of them. The pursuer having been served heir to his mother, (who, as surviving her husband, had the right of fee under her father's settlement), and brought this reduction of the deed in favour of Robert, and of the decree-arbitral, the Court adhered to the interlocutor of the Lord Ordinary, who held, 1st, That the deed was exception-

June 15, 1821.

FIRST DIVISION.

Lord Alloway.

H.

able, as signed by initials, no better than a mark, and as not properly tested; and, 2d, That the submission was not binding on the wife, who survived her husband, and had the fee vested in her, but did not join in, or homologate the submission.

JAS. TODD, W. S.—CHARLES STEUART, W. S.—Agents.

No. 87. H. TWEDDAL and J. RIDDELL, Suspenders.—*Re Thomson.*

A. SEMPLE, Changer.—*J. W. Dickson.*

June 15, 1821, *Jurisdiction—Commissary.*—Semple raised an action of damages before the Commissary-court of Glasgow against Tweddal and Riddell, for an irregular charge given to him to pay a bill which had been previously extinguished. Decree in absence was pronounced against Riddell; and, after a proof, decree was also given against Tweddal. In a suspension, it was pleaded, that the Commissaries had no jurisdiction, nor was it competent to prorogate it in questions of real injury. The Lord Ordinary repelled the reasons; and the Court refused a petition, without answers.

SECOND DIVISION  
Lord Pitmilley.  
B.

TOD & WRIGHT, W. S.—AND. PATERSON,—Agents.

No. 88. PROPRIETORS of KELVIN MILLS, Pursuers.—*Murray—A. Connell.*

INCORPORATION of BAKERS in GLASGOW, Defenders,  
—*Greenshields—Blackwell—Monteith.*

June 16, 1821, *River—Exclusive Privilege.*—This was an action of declarator by the proprietors of mills on the river Kelvin against the Incorporation of Bakers in Glasgow.

SECOND DIVISION.  
Lord Pitmilley.  
F.

gow, also proprietors of mills on that river, to have it found that they had no exclusive right to regulate the supply of water from a reservoir at Kilmannan; which, in terms of an act of parliament, the Forth and Clyde Canal Company had formed, for the mills on the Kelvin; but that the right was vested in the majority of the proprietors or tacksmen. The grounds on which the bakers rested their exclusive privilege was, that from 1776, when the reservoir was completed, the key of the sluice was delivered to a person paid by them, and subject to their orders; and that until 1816 they had uninterruptedly exercised the right of supplying the Kelvin with water. This person was also the servant of the canal proprietors, who were under an obligation to keep the reservoir in repair. The Lord Ordinary found, ' That the alleged acquiescence of the other proprietors in the management of the sluice by the servant of the canal proprietors, under the orders of the defenders, from 1776 until about autumn 1816, when meetings were held on the subject by the pursuers, was not of itself, and in absence of any express acknowledgment of the defenders right, or express abandonment by the pursuers of their own powers; and the pursuers not having had occasion, in the meanwhile, to find fault with the management of the water, sufficient to establish an exclusive right of controul in the defenders over the reservoir in all time coming; or to cut off the right which belonged to the pursuers, as proprietors of the mills on the Kelvin: that the pursuers have a right, along with the defenders, to the reservoir at Kilmannan; and that the defenders are not entitled, against the will of the pursuers, to give directions about open-

‘ ing and shutting the sluice ; and that those matters  
 ‘ must be regulated by a majority of proprietors of  
 ‘ mills on the Kelvin, according to their interest in  
 ‘ the river, or by a committee of their appointment.’  
 To this judgment the Court adhered.

TAIT, YOUNG, & LAWRIE, W. S.—THOS. DARLING,—Agents.

No. 89.

COWAN and SONS, Pursuers.—*Blackwell*.  
 W. REDHEAD, Defender.—*Ro. Bell*.

June 16, 1821.

SECOND DIVISION.

Lord Pitmilley.

M’K.

*Process—Interim-Execution.*—Cowan and Sons having raised action of accounting against William Redhead, one part of it was sent to an accountant to ascertain the balance due to Cowan and Sons; and in another part of it Redhead admitted that he owed a certain sum, but contended that Cowan and Sons had agreed to a composition on this sum, which the Court found not instructed. Interim-decree being issued for the admitted sum, the defender objected, that he meant to appeal to the House of Lords against the judgment of the Court as to the composition, when the whole cause was decided; and craved, that Cowan and Sons should, before extract, find caution to repeat in the event of a reversal; but the Court refused his petition.

R. COWAN, W. S.—JOHN PHILLIPS, W. S.—Agents.

No. 90.

MRS. M’LEOD, Pursuer.—*Marshall*.  
 J. M’LEOD, Defender.

June 15, 1821.

SECOND DIVISION.

F.

*Husband and Wife.*—Decree (in absence) in terms of the libel, concluding for £200 as aliment, in favour

of the pursuer, and against the defender, her husband, who had gone abroad, but had funds in this country.

CHAR. SPENCE—

—Agents.

W. SCOTT MONCRIEFF, Trustee for CATHCART'S No. 91.  
CREDITORS, Changer.—*Bell*.  
G. INNES, Suspender.—*Baird*.

*Adjudication—Ranking and Sale—Constitution of* June 16, 1821.  
*Debt.*—Mr. Innes purchased the estate of Drum un-  
der a judicial ranking and sale; and after decree of SECOND DIVISION.  
sale, of ranking and division, had been extracted, he Bill-Chamber.  
suspended a threatened charge for payment of the Lord Craigie.  
part of the price due to the personal creditors, on the  
ground that they had not constituted their debts;  
and that, therefore, the general adjudication in their  
favour was inept. The Court, on the report of Lord  
Craigie, passed the bill.

One Judge adopted the view of the charger, that although  
in a particular adjudication a creditor must constitute  
his debt; yet in a general adjudication under a process  
of ranking and sale this was not necessary, as the pro-  
cess of ranking afforded a sufficient guard against fic-  
titious claims.

JOHN WAUCHOPE, W. S.—JOHN KERMACK, W. S.—Agents.

J. BLACK and Co. and A. NEWBIGGING, Pursuers.— No. 92.  
*Bell—Cunninghame—Walker*.  
J. M'CALL and Co., Defenders.—*Moncreiff—Buchanan*.

*Execution pending Appeal.*—M'Call and Com- June 16, 1821.  
pany having been found accountable to Black and SECOND DIVISION  
M'K.

Company, and Newbigging, creditors of the partners of a joint adventure, for certain goods belonging to the joint adventure, which they attempted to retain in payment of a general balance due to them by one of the partners, they appealed to the House of Lords; and interim-execution being craved, the Court ordered consignation of the amount in a bank, on caution being found by Black and Company, &c. to pay back the difference between legal and bank interest in the event of a reversal; and awarded execution as to the expenses.

D. CLEGHORN, W. S.—R. COWAN, W. S.—G. HOSARTH, W. S.—  
Agents.

No. 93. General M. BAILLIE, Pursuer.—*Jeffrey—Cockburn.*  
J. BRYSON, Defender.—*Clerk—W. R. Robinson.*

June 16, 1821. *Expences—Auditor's Report.*—In an action of damages against Bryson for adultery, at the instance of General Baillie, from which he was assoilzied, expences were found due to Bryson under certain qualifications; and his accounts having been remitted to the auditor, the only question now was as to the propriety of certain deductions made by the auditor. On advising objections and answers, the Court partly sustained and partly repelled the objections.

CAMPBELL & CLASON, W. S.—CARNEGIE & SHEPHERD, W. S.—  
Agents.

W. P. CAMPBELL, Petitioner.—*Craustoun—Walker.* No. 94.  
 W. DIXON, Respondent.—*Clerk—Forsyth.*

*Execution pending Appeal.*—Dixon having taken June 16, 1821.  
 a lease of a coal-work for a number of years, with a  
 break in a certain event, and alleging that the event  
 had occurred, he suspended a threatened charge  
 for a half-year's rent due at Lammass 1817. The  
 Court having, in February 1821, repelled the rea-  
 sons of suspension, during which interval no rent  
 was paid, nor any charge given for it, Dixon ap-  
 pealed to the House of Lords against the judgment  
 of the Court. Campbell then craved interim-execu-  
 tion not only for payment of the above half-year's  
 rent, but also of the rent since due, and to fall due,  
 during the appeal. The Court awarded execution  
 as to the half-year's rent on caution, but found the  
 application quoad ultra incompetent.

SECOND DIVISION.  
 B.

JAM. M'INNES—D. FISHER,—Agents.

W. GALL, Pursuer.—*Walker.* No. 95.  
 W. MURDOCH, Trustee for HAMILTON'S CREDIT-  
 ORS, Defender.—*Gillies.*

*Compensation—Sale.*—Lowndes, who had been in June 19, 1821.  
 the habit of selling and of consigning goods to Ha-  
 milton for sales and returns, sent a parcel of silks to  
 him, addressed in the invoice, ' Mr. George Hamil-  
 ton, receive from Thomas Lowndes ;' and in a re-  
 lative letter he said, ' The three crimson and scarlet  
 ' tran. I daresay will do you good at 60s. per lib.,  
 ' at which price I trust you will take it to account.'

SECOND DIVISION,  
 Lord Cringletie,  
 F.



Hamilton kept the goods without returning any answer; and Lowndes becoming bankrupt, the goods, or their value, were claimed by Gall, who alleged he had consigned them to Lowndes, as his agent. Having raised action, Hamilton pleaded compensation on a debt due to him by Lowndes, which the Lord Ordinary sustained, on the grounds,—1. That the goods were sent as the property of Lowndes, who desired Hamilton to keep them to account: 2. That, in the circumstances, Lowndes could have insisted that they had been sold to Hamilton; and, 3. That at the time when Gall notified to Hamilton that the silks were his property, the latter was creditor to Lowndes for more than their price, and, in a question with him, would have been entitled to hold the silks till his debt should be paid; and to this judgment the Court adhered.

Observed on the Bench, that this case was not of the nature argued in the petition for Gall, where it was endeavoured to assimilate it to that of an agent retaining, for his general balance, goods the property not of the consignee, but of a third party: the question being, whether there was a sale, and, if so, whether compensation was pleadable.

D. CLEGHORN, W. S.—T. EWART, W. S.—Agents.

No. 96.

R. FRASER, Suspender.—*Gillies*.

REID and AULD, Chargers.—*More*.

June 21, 1821.

FIRST DIVISION.  
Lord Alloway.  
D.

*Process—Citation*.—Fraser suspended a charge of horning left at his dwelling-house on the ordinary short induciæ, on the ground that the charge was irregular, he having resided abroad for six months.

The Court refused the bill, in respect that his domicil was still in Scotland, his family continuing to reside here, and he not having left the country *animo remanendi*.

J. B. FRASER,—A. GIFFORD,—Agents.

W. BRUCE, Suspender.—*Boswell*.

M'KENZIE and BALFOUR, Chargers.—*Skene*.

No. 97.

*Bill of Exchange—Sale—Latent Defect.*—Bruce commissioned from Balfour and Company of Riga a quantity of good sowing seed, for which he accepted a bill payable to James Balfour, the acting partner of Balfour and Company in this country, and he received the seed in December 1819. The bill falling due in February, it was retired by a bill granted by Bruce to Balfour, who indorsed it to M'Kenzie and Balfour, of which house he was also a partner. The seed turned out unfit for sowing; and Bruce having been charged to pay the new bill, he suspended, and raised an action of damages against Balfour and Company and James Balfour, on which he maintained a plea of compensation. In the suspension, the Lord Ordinary, 'in respect the bill charged on is dated in the month of February 1819, and the goods, the bad quality of which is alleged, arrived in this country in the month of December preceding,' found the letters orderly proceeded; and the Court adhered.

June 21, 1821.

FIRST DIVISION.  
Lord Alloway.  
H.

JOHN YOUNG—M'KENZIE & MONYPENY, W. S.—Agents.

No. 98.

P. ANDREW, Suspender.—*M<sup>c</sup>Neill*.  
 BUIK and Co., Chargers.—*D. M<sup>c</sup>Farlane*.

June 21, 1821. *Bill of Exchange*.—Andrew being charged as ac-  
 cepter for payment of a bill, he presented a bill of  
 suspension, on the grounds, *1st*, That his acceptance  
 had been obtained by fraud; and, *2d*, That the bill  
 having been accepted blank in the drawer's name, the  
 chargers had, in collusion with the person who had  
 obtained the acceptance, filled in their names as  
 drawers, and had paid no value for the bill. These  
 facts not having been referred to the chargers oath,  
 the Lord Ordinary refused the bill of suspension;  
 but the Court ordered it to be passed.

CUNNINGHAM & BELL, W. S.—GREIG & PEDDIE, W. S.—Agents.

No. 99.

J. M<sup>c</sup>GAVIN, Petitioner.—*Ballantine*.

June 21, 1821. *Curator Bonis.—Process*.—The curator bonis of an  
 insane person cannot be exonerated unless he has called  
 a proper contradictor.

WM. BALLANTYNE, W. S.—Agent.

No. 100. MRS. TRAIL OF ALCOCK and Others, Petitioners.—  
*Marshall*.

June 21, 1821. *Tutor and Curator*.—Three tutors-dative having  
 been appointed by the Barons of Exchequer to James  
 Stewart of Brugh, but without any provision for sur-  
 vivance, the petitioners, the nearest of kin, applied  
 for the appointment of a factor loco tutoris, on the

ground, that, by the death of one of the tutors, the whole nomination had fallen ; but the Court refused the petition, in respect of the gift of tutery.

CHAS. SPENCE,—Agent.

J. and J. PEDDIE, Pursuers.—*Moncreiff*—D. M'Farlane. No. 101.

A. M'KECHNIE, Defender.—*Blackwell*.

*Implied Obligation*.—J. and J. Peddie raised action against M'Kechnie for payment of the board of his nephew, whom he had introduced into their seminary ; but the Court assolizied him, as it appeared from various circumstances that they did not look to M'Kechnie for payment ; and particularly, that, subsequently to the introduction, they got the termly payments of the board from the boy's father, and after his death from his uncle-in-law, (now insolvent), to whom they had written, when he was dilatory, that they relied on him alone for payment.

June 21, 1821.

SECOND DIVISION.  
Lord Cringletie  
B.

JAS. DUNDAS, W. S.—CAMPBELL & CLASON, W. S.—Agents.

F. LEITH, Advocate.—*P. Robertson*.

No. 102.

W. SMITH and Others, Respondents.—*Bell*.

*Title to Pursue—Proof*.—In an advocacy of the decree of an inferior court against Leith for restitution of part of the effects of a bankrupt, which it was alleged he had assisted him to embezzle, the Lord Ordinary held,—1. The title of trustees acting on a trust-deed, not superseded by a posterior disposition omnium bonorum under a cessio, the trust-deed not being challenged ; and, 2. He ordained

June 22, 1821.

FIRST DIVISION.  
Lord Gillies.  
D.

Leith (before answer) to undergo a judicial examination, the circumstances of the case affording strong suspicions against him; and the Court adhered.

J. R. STODART, W. S.—GEORGE WATSON,—Agents.

No. 103.

COCHRANE and Co., Pursuers.—*Forsyth.*

D. MATHIE, Defender.—*Blackwell.*

June 22, 1821.

FIRST DIVISION.

Lord Alloway.

D.

*Cautioner—Bankrupt—Indefinite Payment.*—Mathie promised to Cochrane and Company, on 15th November 1815, to ‘guarantee their payments for ‘articles to be furnished six months from this date’ to M’Gowns, ‘in order that you may have a sufficient opportunity to obtain satisfaction as to their ‘trustworthiness. But the guarantee is to be limited to £500.’ Cochrane and Company furnished yarns to M’Gowns between November and March to the extent of upwards of £1,000. In March, M’Gowns having suspended payment, a meeting of their creditors was held, of which Cochrane and Company were aware, when it was determined that they should still continue business. At this time the balance due to Cochrane and Company was £141 : 10 : 2; and they afterwards sold yarns to M’Gowns to a large amount. In July, they got a partial payment, and M’Gowns were sequestrated in August. Cochrane and Company having raised an action against Mathie for the whole amount of the guarantee, the Court held,—

1. That he was not liable for the price of the articles furnished subsequent to the meeting of M’Gowns’ creditors.

2. That under the guarantee he was liable for the balance due previous to that meeting, although, during that interval, the value of the yarns furnished exceeded £500, and although it was alleged that part of that furnishing was made on the faith of indorsed bills of another party.

And, 3, That the pursuers were not obliged to apply the payment in July to the balance due prior to the meeting, but were entitled to apply it to the debt thereafter contracted.

D. FISHER—GEO. NAPIER,—Agents.

W. MURRAY.—*Buchanan—M'Neill.*

No. 104.

J. PHILLIPS.—*Bell—Boswell.*

Competing.

*Bankrupt—Trustee—Affidavit—Security.*—In a competition for the office of trustee on the estate of D. Halley and Company, the Court repelled (16th February 1821) the following objections made to the votes of certain creditors at the election.—

June 22, 1821.

FIRST DIVISION.  
D.

1. That the Perth Banking Company, owing to their involved and questionable transactions with the bankrupt, had an interest hostile to that of the creditors at large, and were thus not entitled to vote for a trustee.

2. That the affidavit on which Mr. Spottiswoode claimed to vote was made by him, not as managing partner, but as *cashier* of the Perth Bank.

3. That in the claim and affidavit of the bank the final balance due, after deducting securities, in terms of 54. Geo. III, c. 137, § 24, was not specified, as required by the act.

4. That no vouchers of a balance said to be due by

the bankrupt as a cautioner were produced, except the bond of caution, bearing, ' that a stated account ' made out from the books of the said banking company, and certified by the cashier and accountant of ' the same for the time, shall be sufficient to constitute a balance;' and an excerpt in terms of the clause.

5. That the affidavits had been made before a baron-bailie.

On advising a petition and answers, minutes were ordered on the third objection; after which the Court altered their former interlocutor, so far as to find, that it is required by the 54. Geo. III, c. 137, that when an affidavit contains several articles composing one claim, from some of which deductions are made, in terms of the 24th section, the vote is not good to the amount of the articles which suffer no deduction; but the claimant must, in order to qualify himself to vote, specify distinctly the balance of debt which, on the whole, is the ground of his vote.

THOS. PATTON, W. S.—JAMES ADAM, W. S.—Agents.

No. 105.

G. INNES.—*Clerk—Forbes.*

G. CRAIG.—*Moncreiff—Bruce.*

Competing.

June 22, 1821.

SECOND DIVISION.

Lord Pitmilley.

B.

*Competition—Creditor of Defunct.*—William Home deposited with Innes a bond in security of arrears of rent due by his son and son-in-law, tenants of Innes. No assignation, although promised, was ever granted, but Innes drew the interest on the bond for several years. After Home's death, the debtor in the bond raised a multiplepounding, in which Innes claimed to be preferred; but he was opposed by Craig, who held an intimated assignation to the bond granted by the

executor of Home, in payment, as he alleged, of rent due by Home himself, and for money advanced to the executor to pay off Home's debts. Innes then raised an action against the representatives of Home, to have it found that the bond was impledged with him, and that they were bound to assign it to him; or to relieve it by payment of the debt. This action being conjoined with the multiplepoinding, the Lord Ordinary found,—1. That though the representatives of Home were bound to assign the bond, yet this being now imprestable by the assignation to Craig, decree should go against them for the balance due on the bond; and,

2. In respect of Craig's assignation, and that Innes did not take any document of debt or assignation to the bond, with warrandice, during Home's life, Craig was to be preferred.

But the Court, holding Innes to be a creditor of Home, altered the interlocutor, so far as it preferred Craig; found Innes entitled to be ranked on the fund in medio; and remitted to the Lord Ordinary to ascertain the extent of the claim; whether Craig was also entitled to the character of a creditor; and had, after Home's death, made advances on the assignation to pay his debts, and as to the effect thereof.

JO. MACKENZIE, W. S.—TAIT & BRUCE, W. S.—Agents.

J. M'ARTHUR,\* Pursuer.—*Gordon—Dick.*

No. 106.

R. M'ARTHUR, Defender.—*Forsyth—Brodie.*

*Vouchers—Jurisdiction.*—J. M'Arthur having failed an action of count and reckoning against R. Mac-

June 9, 1821.

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Lord Cringletie.  
B.

\* See 30th May 1821. Same parties, No. 45.



Arthur, his late attorney on his estate in the West Indies, the Lord Ordinary, after finding that the pursuer was, in respect of long acquiescence, not entitled to inquire into the necessity of certain articles of expence on the estate, ordained the defender to produce all the vouchers for such expence where they were usually taken. Robert M<sup>c</sup>Arthur endeavoured to show that the pursuer had become unduly possessed of these vouchers; and that by the regular transmission of monthly and annual accounts for eleven years, which had never been disputed by the pursuer, he was absolved from the obligation of producing them; but his proof on the former allegation not being satisfactory, the Court adhered.

The defender also disputed the jurisdiction of the Court, as the transactions had occurred in the West Indies; but he was a native of Scotland, and resident here, and, therefore, this plea was also repelled.

MACKENZIE & INNES, W. S.—FALCONER & JOHNSTON,—Agents.

No. 107. T. and J. STEVENSONS, Suspenders.—*Moncreiff—Brown.*

R. BAIRD, Charger.—*Cranstoun—Hope.*

June 23, 1821. *Tack—Removing.*—Stevensons, tenants of Baird,

SECOND DIVISION. bound themselves by their tack to remove at certain  
Bill-Chamber. specified terms in 1821 and 1822, 'without any warn-  
Lord Meadowbank. ing or process of removing to be used for that effect.' A  
M<sup>c</sup>K. summons of removing was executed and called against  
them in the Sheriff-court more than 40 days before  
the term of Whitsunday 1821, and decree in absence  
was pronounced. They presented a bill of suspen-  
sion, on the ground, that the summons was null, as it

did not specially libel on the act of sederunt 14th December 1756. The Lord Ordinary refused the bill, and the Court (by a majority) adhered.

The majority were of opinion, that where a tenant binds himself to remove without warning, an action at common law on this obligation is competent, provided it be executed and called against the tenant 40 days prior to Whitsunday; and that as this was a common law action, the summons was the more unexceptionable that it did not libel on the act of sederunt. One of the Judges in the minority thought, that as the landlord had availed himself of the act of sederunt, he was bound to libel on it; and another, who also held that the action was under the act of sederunt, wished an inquiry into the practice of libelling summonses under it.

J. & A. SMITH, W. S.—A. STEVENSON, W. S.—Agents.

N. WILSON and Others, Suspenders.—*Moncreiff*—No. 108.  
*Rutherford.*

J. KIPPEN and Others, Chargers.—*Clerk*—*Forsyth.*

*Society—Title to Pursue.*—A dispute and secession having occurred among the members of the Greenock Coffeeroom, (which was managed by a committee chosen annually by the majority of the subscribers), Kippen and others, designing themselves as a 'majority of the committee of management of the Greenock Coffeeroom for the year 1819;' and as 'the committee of management of said Coffee-room for the year 1820,' raised action before the Sheriff of Renfrewshire, concluding that the furniture of the association should be declared their pro-

June 23, 1821.

SECOND DIVISION.

Bill-Chamber.

Lord Robertson.  
M'K.

perty as managers ; for warrant of delivery and sale to pay off the debts of the society, and for consignment of the balance, subject to the future orders of Court. The Sheriff having sustained the title of the chargers to pursue, and decerned in terms of the conclusions, Wilson and others, composing the minority, presented a bill of suspension, which was refused by the Lord Ordinary ; but the Court, while they sustained the title of the chargers, Kippen, &c. passed the bill as to the merits, on caution.

Observed on the Bench, that this being a dispute among the members themselves, there could be no objection to the title of the chargers.

YOUNG, AYTOUN, & RUTHERFORD, W. S.—MACMILLAN & GRANT,  
—Agents.

No. 109. MRS. M'LEOD and Others, Pursuers.—*Bell—Wood.*  
A. M'KENZIE, Defender.—*Forbes.*

June 26, 1821.

SECOND DIVISION.

Lord Cringletie.

B.

*Bill of Exchange—Indefinite Payment—Agent.—*A bill having been indorsed by M'Leod, the uncle and tutor of the pursuers, to M'Kenzie, the defender, agent for the British Linen Company at Inverness, it was found by a decision of the Court to belong to the pursuers. They then insisted against M'Kenzie for payment of it, (the principal obligants being insolvent), on the grounds, 1. That it was deposited with him to recover payment of the contents ; and that by his conduct he had rendered himself responsible for the amount, whether he had got payment or not ; and, 2. That he had got payment of part of it, and had, after the bill fell due, received money from one of the obligants, which ought to have been applied in

extinction of the bill. The Lord Ordinary found, 1. That to a certain extent he had received payment, and decerned accordingly: 2. That there was not sufficient evidence to render him generally liable on account of his conduct; and, 3. That although he did receive indefinitely money from one of the obligants after the bill fell due, yet as he himself was at that time creditor of the obligant, he was not bound to appropriate it to this bill. And to this judgment the Court adhered.

A. BURNS, W. S.—M'KENZIE & MONYPENNY, W. S.—Agents.

M. LINNING, Pursuer.—*Bell—Russell.*

A. DOUGLAS, Common Agent in Parkhall Ranking,  
Defender.—*M'Neill.*

No. 110.

*Agent and Client—Writer's Hypothec.*—Linning received from the late Mr. Livingstone a bond and bill in security of payment of a law-account. {The bond bore to be granted for law-expences, but without prejudice to the agent's right of hypothec over his employer's title-deeds. Linning assigned the bond under absolute warrandice, and discounted the bill. Neither the bond nor bill having been paid by Livingstone, Linning retired the bill, and was retrocessed in the right of the bond.

June 27, 1821.

FIRST DIVISION.

Lord Gillies.

D.

The question arose, in the ranking of Livingstone's creditors under a judicial sale of his estate, whether the agent had still a right of retention over the title-deeds in his possession? or whether it had been renounced, or had expired in consequence of the separate securities by the bond and bill, and of their transmission to third parties? The Court reversed

the interlocutor of the Lord Ordinary, and held that Linning's right of retention was still effectual.

M. LINNING, W. S.—ALEX. DOUGLAS,—Agents.

No. 111. G. NIVEN, Suspender.—*J. W. Dickson—Shaw.*  
G. ALLAN, Charger.—*Cuninghame.*

June 27, 1821. *Meditatio Fugæ—Jurisdiction—Justice of Peace.*

SECOND DIVISION.

Bill-Chamber.

Lord Meadowbank.

B.

—Niven, an apprentice of Allan, before the termination of his indenture, left his service, alleging he had been turned off; went to England; and on his return to Scotland, two years thereafter, was apprehended and examined under a warrant by a Justice of the Peace, and thereafter imprisoned on the sentence and warrant of a single Justice, till he found caution to return to his service. He presented a bill of suspension and liberation, on the grounds,—

1. That he had been imprisoned as in *meditatione fugæ*, without any of the usual forms being observed.

2. That the proceedings were nimious, as the charger, at the time when he presented the complaint to the Justices, had raised caption, and had a solvent cautioner under the indenture: And,

3. That Justices of the Peace had no jurisdiction in questions on the contract of indenture; and, at all events, a single Justice had no power to pronounce sentence in such questions.

The Lord Ordinary refused the bill; but the Court, of consent, passed it on caution.

At advising, it was observed, that this was not a warrant as in *meditatione fugæ*.

H. WRIGHT, Suspender.—*Clerk—Ivery.*  
G. CRAWFORD and MANDATORY, Charger.—*Black-  
well—Jameson—Pyper.*

No. 112.

*Process—Bill of Exchange.*—Crawford employed Wright, as his agent in Glasgow, to sell linen, 'on condition that you have Mr. Andrew Tenant's approval of any house you sell to on credit; otherwise you to be accountable.' Wright, without Tenant's sanction, sold goods on bills taken payable to himself, and which (as was his custom) he indorsed to Crawford. The buyer becoming bankrupt, Crawford charged Wright on his indorsation to pay the bills. Wright presented a bill of suspension, alleging that, in the circumstances, the debt must be held as illiquid against him, and that summary diligence was not competent. The Lord Ordinary passed the bill on caution. Against this order for caution Wright petitioned. The Court was equally divided; but a Lord Ordinary having been called in, adhered; and a second petition, with answers, was refused.

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Bill-Chamber.  
Lord Cringletie.  
M'K.

GIBSON, CHRISTIE, & WARDLAW, W. S.—JAS. LANG, W. S.—  
Agents.

J. WILKINSON, Pursuer.—*More.*  
W. MONIES and W. IRELAND, Defenders.—*Keay—  
Jameson.*

No. 113.

*Interest—Process.*—Wilkinson pursued Monies and Ireland for payment of a balance due on a mercantile transaction which had taken place in Charlestown, South Carolina; concluding in his summons for payment 'of the foresaid balance of £2,307 : 11 : 6½

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FIRST DIVISION.  
Lord Hermand.  
H.

‘ sterling, with the foresaid sum of £1,269 : 10 : 2  
‘ sterling of interest thereon to the said 1st day of  
‘ January 1806; the said balance and interest a-  
‘ mounting, conform to the said account-current and  
‘ statement of interest, to the said sum of £3,577  
‘ 1s. 8d. sterling, together with the lawful interest  
‘ upon said balance of £2,307 : 11 : 6½ from and  
‘ since the said 1st day of January 1806, and in time  
‘ coming till payment.’ The balance being ascer-  
tained, the Court considered it as a foreign debt,  
(though the parties had for some years resided in this  
country); and after taking the opinion of English  
and American counsel, found,—

1st, That interest was due on open accounts by  
the laws of South Carolina.

2d, That the interest should be calculated accord-  
ing to the rate allowed in the foreign country, which,  
in this case, was 7 per cent.

3d, That this rate of interest should be allowed  
till the day of payment.

Some of the Judges thought, that under the conclusion  
for *lawful* interest, agreeably to the precedent in Gor-  
don and Hyslop, 1st March 1821, Second Division,  
(not yet reported), although the foreign interest must  
be given to the day of citation, the interest afterwards  
should be restricted to 5 per cent.

T. DARLING—MACRITCHIE & MURRAY, W. S.—Agents.

Sir A. COCHRANE, Advocate.—*Dean of Faculty* No. 114.

*Ross—Forsyth—M'Kenzie—Jardine.*

Dr. RAMSAY, Respondent.—*Clerk—Moncreiff—  
Speirs.*

*Service of Heir.*—Dr. Ramsay took out a brief June 28, 1821.  
from Chancery for a general service of himself as SECOND DIVISION.  
' nearest lawful eldest heir-portioner of the deceased Bill-Chamber.  
' Alexander Inglis of Murdieston, his great great Lords Glenlee and  
' grand-uncle,' directed to the Sheriff of Edinburgh. Craigie.  
Sir A. Cochrane was infeft in the estate of Murdie- F.  
ston; and the avowed object of Dr. Ramsay's service  
was to put himself in a situation to reduce Sir Alex-  
ander's title. Sir Alexander presented a bill of ad-  
vocation of the brief, and claimed a right to appear  
and be heard as a party in the service; which the  
Lord Ordinary (Glenlee) refused, ' as the complainer  
' neither has obtained, nor alleges he can obtain, a  
' competing brief;' and to this judgment the Court  
adhered.

A second bill of suspension was refused by Lord Craigie,  
who, in a note, stated, he did so on the precedent  
of Hunter against Forbes, 3d July 1810; but of the  
soundness of which he doubted. At the advising,  
none of the Judges, except his Lordship, threw any  
doubt on that case.

JAS. SWAN, W. S.—GEO. DUNLOP, W. S.—Agents.



No. 115.

DANIEL PROVAN, Suspende<sup>r</sup>.—*Blackwell*.R. GRAY, Charge<sup>r</sup>.—

June 29, 1821.

FIRST DIVISION.

Lord Alloway.

H.

*Process—Bill of Exchange—Forgery.*—Walter Provan having, in payment of a debt to the charger, given him a promissory-note, to which he had forged his brother Daniel Provan's signature, the latter, though personally cited, and informed of the forgery by his brother, allowed decree to pass against him in the Inferior Court. In a suspension of a charge on this decree, on the ground of the forgery of his name, the Lord Ordinary, in respect it appears that the suspender was <sup>not only</sup> personally ~~not only~~ cited, in ' the Inferior Court, but there was a pleading there ' in his name; and it is positively alleged that the ' plea of forgery was never stated until the bill of sus- ' pension was presented, repels the reasons of sus- ' pension, finds the letters orderly proceeded, and de- ' cerns.' The Court refused a petition against this judgment without answers, although it was denied that any person held a mandate or authority to plead for the suspender in the Inferior Court.

THOS. DARLING—GEO. DUNLOP, W. S.—Agents.

No. 116.

J. WRIGHT and Others.—*Bell*.J. MURRAY.—*M'Farlane*.

Competing.

June 29, 1821.

FIRST DIVISION.

Lord Gillies.

H.

*Process—Adjudication in Implement.*—Fergusson, by a missive of sale, sold an heritable property to Murray, and received part of the price: the rest of it was arrested in Murray's hands by Wright and

and others, creditors of Fergusson. Fergusson becoming bankrupt, granted, under the act of grace, a general disposition omnium bonorum to Wright and others, his creditors. Murray, under his special minute of sale, and Wright, &c. on the general disposition, raised each of them adjudications in implement of their respective titles. Both actions came into the Lord Ordinary's hand-roll on the same day, that at the instance of Wright, &c. standing first in the roll. The Ordinary, after hearing parties, and regarding this as a competition, proceeded to give decree in Murray's adjudication *first*; and *then* refused decree in that by Wright and others, in respect of the decree pronounced in the other case. The Court, in a question of the competency of the proceeding of the Lord Ordinary, where both the parties were asking decree of adjudication in implement, adhered to his interlocutor.

JAMES SMYTH, W. S.—TOD & WRIGHT, W. S.—Agents.

A. BOGLE, Complainer.—*Forsyth—Irving.*

No. 117.

Lord A. HAMILTON, Respondent.—*Clerk—Jardine.*

*Freehold Qualification.*—Bogle claimed to be admitted on the roll of Freeholders of Lanarkshire on a crown-charter, and the usual relative titles, conveying to him ‘all and whole the lands of Gayne, with the ‘pertinents, extending to a forty shilling land of old ‘extent, with that part of the lands of Bridgend of ‘Inchnock, sometime possessed by Walter Nielson, ‘being the just and equal third part allocated to ‘Rebecca Hay, of all and whole the forty shilling ‘land of Inchnock, and forty shilling land of Gayne ‘of old extent, with the manor-place,’ &c.

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SECOND DIVISION.  
F.

The Freeholders refused to admit him on the roll,

as his titles shewed that he had right only to one-third of the forty shilling lands there mentioned. Bogle complained to the Court, alleging that his title contained the whole forty shilling land of Gayne. Besides the above objection, the Freeholders farther objected, that even although his titles conveyed to him the forty shilling land of Gayne, yet he was not in possession of Gaynedikehead, which formed an integral part of the forty shilling land of Gayne; and the Court, finding this instructed by written evidence, dismissed the complaint, and found Bogle liable in full expences, and in the statutory penalty.

JAS. SWAN, W. S.—YOUNG, AYTOUN, & RUTHERFORD, W. S.—  
Agents.

No. 118. R. GRAY and SON, and Others, Complainers.—*Jeffrey*  
—*Jameson*.

J. NEWLANDS and Others, Defenders.—*Clerk—Ivory*.

June 29, 1821. *Bankrupt*.—The estate of A. G. Thomson having  
SECOND DIVISION. been sequestrated, it was resolved by Newlands and  
M'K. others, who formed a majority of the creditors, in  
opposition to Gray and others, who were the minority, to accept £300 as a compromise of a claim which the estate had against Cameron, Thomson, and Company, in preference to an offer made by Gray and others, more advantageous to the estate. This resolution was rescinded by the Court, and the trustee was directed to act according to law. Having proceeded to raise an action against Cameron, Thomson, and Company for the whole debt, the same majority being desirous to enter into the compromise, and to discharge the debtors so far as regarded their

own debts, stated at a meeting of the creditors, that they had no objection to convey to the minority 'such a proportion of the debt claimed from Thomson, Cameron, and Company, as may effeir and correspond to their debts, and allow them to prosecute upon that title;'—and resolved that the trustee be prohibited from incurring any expence in prosecuting the claims against Cameron, Thomson, and Company, chargeable upon the trust-funds.' Of this resolution the minority complained; and the Court found that it was to be 'sustained to this extent only, that no part of the expence of the action in name of the trustee against Cameron, Thomson, and Company shall be defrayed out of that portion of the trust-funds which may belong to the creditors concurring in that resolution, unless they shall avail themselves of a decree in such action.'

Observed on the Bench, that in the event of a decree in favour of the trustee, the fund thence arising would be exclusively available to those contributing to the expence of the action, to the extent of 20s. per pound; and that any reversion would go to the bankrupt.

G. NAPIER—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

UNION CANAL COMPANY, Suspenders.—*T. H. Miller.* No. 119.  
R. ROBB, Charger.—*Forsyth.*

No point occurred in this case. It was a charge by Robb, tenant in certain lands through which the Union Canal was to be cut, against the Canal Company, on a decree-arbitral, finding Robb entitled to £90 of damages for ground taken from his farm. They suspended to the extent of £79 : 14 : 8, not

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SECOND DIVISION.

Bill-Chamber.

Lord Bannatyne.

F.

upon any ground affecting the decree-arbitral, or implying a challenge of it ; but on a separate agreement of Robb to repay to the Canal Company the value of such abatement as he should be entitled to from the landlord. The Court passed the bill.

R. STRACHAN, W. S.—J. G. DAVIDSON, W. S.—Agents.

No. 120.

W. STEWART, Suspender.—*More.*

W. PATRICK, W. S. Charger.—*Boswell.*

June 30, 1821.

SECOND DIVISION.

Bill-Chamber.

Lord Craigie.

R.

*Process—Decree.*—The question here was as to passing a bill of suspension in the following circumstances. —M<sup>r</sup> Knight and M<sup>r</sup> Ilwraith having agreed to pay a composition on their debts to their creditors, Stewart became surety to the extent of £2,000 for the cautioners (who were afterwards insolvent) for the composition, and the bankrupts conveyed to him and another their estates in trust for the creditors. These trustees raised an action of multiplepinding and exoneration, in the summons of which it was stated, that Stewart would fall to pay what part of the £2,000 he might be found liable for. Stewart was thereafter sequestered, and discharged on a composition. Patrick, as common agent for the creditors, having got decree in the multiplepinding for the composition due by Stewart on the £2,000, charged him on his composition-bond. He presented a bill of suspension, alleging that the decree was in absence, and craving to be heard on his liability. The Lord Ordinary refused the bill ; but the Court remitted with instructions to pass it, if caution were found within fourteen days.

A. CRAUFUIRD, W. S.—WM. PATRICK, W. S.—Agents

R. Ross, Advocate.—*Jameson.*

No. 121.

J. TAYLOR and Co., Respondents.—*Cuninghame.*

*Advocation—Statute 50. Geo. III, c. 112.*—Ross June 30, 1821.  
 having raised an action against Taylor and Company SECOND DIVISION:  
 before the Magistrates of Glasgow, after several in- Lord Pitmilley.  
 interlocutors the following judgment was pronounced. B.  
 —‘ Having heard parties on the motion for the  
 ‘ pursuer, and considered the state of accounts be-  
 ‘ tween the parties under the interlocutors of 22d  
 ‘ December and 26th January last, with former pro-  
 ‘ cedure, appoints the extractor of Court to pay over  
 ‘ to the defender the small balance of 10s. 1d., and  
 ‘ to the pursuers the remainder of the said sum,  
 ‘ (which had been consigned); assoilzies the defend-  
 ‘ ers quoad ultra, and decerns: finds there are no  
 ‘ grounds for awarding expences to either party,  
 ‘ and decerns.’ Within five days after this judg-  
 ment a bill of advocation by Ross was passed and  
 intimated. Thereafter Taylor and Company pre-  
 sented a petition to the Magistrates on the point  
 of expenses, which they refused as incompetent,  
 in respect of the advocation, ‘ though within the  
 ‘ reclaiming days.’ In the Supreme Court, Taylor  
 and Company objected to the competency of the  
 advocation, that as the reclaiming days had not ex-  
 pired, the judgment was not final; but the Court  
 held, that as the judgment exhausted the whole  
 merits of the case, the advocation was competent  
 under the statute 50. Geo. III, c. 112.

G. MACDOWALL.—GREIG &amp; PEDDIE, W. S.—Agents:

No. 122.

MRS. CUNNINGHAM, Petitioner.—*Dick.*

July 3, 1821.

FIRST DIVISION.

S.

*Foreign Recorded Deeds.*—Mrs. Cunningham, the creditor in a bond which had been recorded in the books of Council and Session, wishing to enforce her claim against the debtor, Alexander Cunningham, formerly of Greenock, but who had resided for some years in Jamaica, where all his property was situated, petitioned the Court for a warrant on the Lord Clerk-Register to deliver up the bond for the purpose of being sent to Jamaica, (the courts of that country not allowing any judicial proceedings to take place on an extract, and requiring production of the deed itself), and to authorize an authenticated copy to be kept in its place. The Court (3d June) refused to grant the warrant desired; but afterwards, on advising a reclaiming petition, with a minute on the part of the Lord Register, they granted warrant for delivery of the bond, on caution being found for its restitution within a year.

G. NAPIER,—Agent.

No. 123.

D. M'TIER, Pursuer.—*Forsyth—Campbell.*

MRS. FERGUSON and Others, Defenders.—*Blackwell—Ballantine.*

July 3, 1821.

FIRST DIVISION.

S.

*Cessio Bonorum.*—The Court refused a cessio bonorum, because the bankrupt, though engaged in an extensive business as a nurseryman, had kept no books, and had not accounted satisfactorily for his property.

RICHD. CAMPBELL, W. S.—WM. BALLANTINE, W. S.—Agents.

G. ODDY, Pursuer.—*Jameson—Shaw.*  
G. DOUGLAS and Others, Defenders.—*Grahame.*

No. 124.

*Bankrupt—Cessio Bonorum.*—Oddy, pursuer of a cessio bonorum, being under sequestration, the Court ordered the trustee on his estate to report as to his conduct; and he having reported that he had not kept regular books,—had rendered no state,—had not made a fair disclosure of his affairs,—had been rearing up fictitious claims, and, in general, had not complied with the requisites of the bankrupt-law, the Court, after allowing objections to be given in to the report, and answers, refused the cessio hoc statu.

July 3, 1821.

SECOND DIVISION.

F.

CHAS. FISHER—CAMPBELL & BURNSIDE,—Agents.

W. HENDERSON and Others, Complainers.—*Jeffrey—*  
*Ivory.*

No. 125.

A. LANG and Others, Respondents.—*Moncreiff—*  
*Hope.*

*Burgh—Election of Magistrates.*—A petition and complaint against the election of the magistrates of Selkirk, (which took place on the 4th October 1820), was, on Monday the 4th December following, presented, and marked by the clerk of Court, by the collector of the fee-fund, and by one of the Judges clerks, but was not presented to the Court till the next day, being Tuesday the 5th of December, when a warrant of service was granted. It was objected, that by the 16. Geo. II, c. 11, § 24, it is required that any petition and complaint against the election of magistrates 'be presented to the said Court of Session with-

July 3, 1821.

SECOND DIVISION.

F.



‘ in two calendar months after the annual election :’ that the two months had expired before the petition and complaint was presented to *the Court* ; and that it was not sufficient to present it to the clerk within the statutory period.

The Court sustained the objection, and dismissed the complaint.

No. 126.

JAS. PAUL, Pursuer.—*More.*

TRUSTEES of the late JOHN PAUL, Defenders.—*Greenshields.*

July 5, 1821.

FIRST DIVISION.  
Lord Alloway.  
H.



*Presumed Alteration and Revocation.*—John Paul, in his trust-settlement, conveyed to the defenders, as trustees, certain heritable subjects in Glasgow, which he burdened with a sum of £400 to be paid after his death to his son, James, but reserving full power to alter. These subjects were afterwards sold by John Paul to the Magistrates of Glasgow, under an act of parliament for improvement of the city, and he got from them a personal bond for the price. This bond he assigned to Alexander, his creditor, in liquidation of a debt of £300, taking his note for the balance. James Paul brought this action against the trustees after his father's death for payment of the £400, as from the surrogatum of the burdened subjects.

The Lord Ordinary found the settlement now ineffectual, in respect the late Mr. Paul, during his life, voluntarily sold these subjects ; and any sums which still remain arising from the price, must be applied in payment of his personal debts ; and the Court adhered on this additional ground, that the price did not remain invested in the bond by the Magistrates, but was exchanged for Alexander's acceptance ; and as

that bill, the price, and whole personal funds in the hands of the trustees, had been exhausted for the payment of debts.

CAMPBELL & MACK, W. S.—ROB. PAUL, W. S.—Agents

A. McDONALD, TRUSTEE ON HENDERSON'S Estate, No. 127.  
Pursuer.—*Maitland*.

A. KELLY, Defender.—*A. Wood*.

*Implied Mandate*.—The trustee in a sequestration sent to Kelly, the agent, without any directions, a bill by the purchaser of part of the bankrupt's stock. To account of this bill before it fell due the trustee received several partial payments, and agreed to renew it; but having given no intimation of this to Kelly, he proceeded to charge the acceptor, who obtained suspension, with expences. The trustee pursued Kelly for relief of these expences, as having acted without authority. A majority of the Court adhered to the Lord Ordinary's interlocutor, finding that the transmission of the bill by the trustee afforded to the agent, Kelly, an implied mandate to do diligence, and assoilzieing him from the action.

July 5, 1821.

FIRST DIVISION.  
Lord Gillies.  
S.

ENEAS M'BEAN, W. S.—M'KENZIE & MONYPENNY, W. S.—  
Agents.

STEWART and HAMILTON, Suspenders.—*Bell—Shaw*. No. 128.  
TELFER and Co., Chargers.—*Jameson*.

July 5, 1821.

*Oath—Intrinsic or Extrinsic*.—Stewart and Hamilton accepted a bill in favour of Telfer and Company, who indorsed it to George Douglas, and there—  
SECOND DIVISION.  
Bill-Chamber.  
Lord Meadowbank.  
F.

after paid a balance due on it. Having got an assignment, they charged Stewart and Hamilton to pay the amount, who suspended, on the ground that they had conveyed property to Telfer and Company, in payment of the bill, from the proceeds of which it had been paid. This they referred to the oath of Telfer and Company, who deponed, that the property assigned by Stewart consisted of two sixteenths of a vessel, and one sixteenth by Hamilton; 'and that 'upon every sixteenth, after deduction of debts and 'expences, the proceeds amounted to £43 some odd 'shillings.' It was on this oath contended, that having admitted the receiving of the property belonging to Stewart and Hamilton, it was incumbent on Telfer and Company to prove, otherwise than by their own oath, that the value of the shares was only £43; this being an *extrinsic* quality. The Court refused the bill.

COLL M'DONALD, W. S.—DONALDSON & RAMSAY, W. S.—Agents.

No. 129. W. JEFFREY, Trustee for M'ARTHUR'S CREDITORS,  
Suspenders.—*Forsyth*.  
W. BROWN and Others, Chargers.—*Greenshields*.

July 5, 1821. *Res Judicata*—Trustee.—M'Arthur and Compa-

SECOND DIVISION.

Bill-Chamber.

Lords Bannatyne  
and Cringletie.

M'K.

ny, prior to their bankruptcy, bought a vessel from Brown and others, of which they took possession, but did not pay the price, nor receive a legal title to her. Watson, as trustee under a sequestration of their estate, agreed to pay the price, and to relieve Brown, &c. of all claim against them, as owners, posterior to the date of the sale to M'Arthur and Company, provided he was allowed to draw

the freights from that date. This was done accordingly, and from these he paid a dividend. In an action before the Admiralty by Brown, &c. against Watson, for relief of certain claims made on them as owners of the vessel, decree was pronounced against Watson personally, 'in respect that he ought to have retained 'in his hands sufficient to answer the present claim.' Watson presented a bill of suspension, in which Jeffrey was his cautioner, and, pending the proceedings, having resigned the trusteeship, Jeffrey was elected in his place, and the litigation proceeded both in Watson's name, on account of his personal responsibility, and in Jeffrey's, as trustee. Decree, finding the letters orderly proceeded, and finding Watson liable in expences, was by him allowed to become final, while the litigation was carried on by Jeffrey unsuccessfully. Jeffrey being charged personally to implement the decree, he presented a bill of suspension, which the Court refused, 1. As it was *res judicata* that Watson was personally liable, and Jeffrey was his cautioner; and, 2. As Jeffrey had been a party in the original suspension.

ALEX. KIDD—JAMES GEMMILL,—Agents.

J. HENDERSON.—*Solicitor-General*—*M<sup>c</sup>Kenzie*.

No. 130.

R. CAMPBELL.—*Moncreiff*—*T. H. Miller*.

Competing.

*Competition—Confirmation—Accretion.*—James Buchanan was infest in an heritable property on a precept *a me*, but received no charter of confirmation. He granted an heritable bond and disposition in security to James Henderson, with a pre-

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SECOND DIVISION.

Lord Pitmilley.

B.

cept of sasine, also *a me*, on which sasine was taken, (7th December 1808). Afterwards Buchanan granted another heritable bond in favour of the Miss Browns: and, in like manner, the precept was for infefting them *a me*. On this precept the Miss Browns were infeft, (8th March 1811), and then obtained from the superior confirmation of the heritable bond and infeftment in their own favour, but not of the title of Buchanan. On their death Campbell was sisted as their representative. Henderson afterwards procured a charter from the superior, confirming in his own favour (in one and the same deed) the disposition and sasine of Buchanan, the common author; also the heritable bond and sasine in his own favour. In an action of mails and duties, the Sheriff preferred Henderson, 'in respect of the priority of his heritable bond and infeftment;' but the Lord Ordinary, in an advocacy, considering the confirmation of Buchanan's title as accrescing to the first confirmed heritable bond and infeftment, preferred Campbell, the representative of the Miss Browns; and to this judgment the Court adhered.\*

W. COOK, W. S.—D. BALLINGALL, W. S.—Agents.

\* The Court being equally divided on the question of expences, this case stands over for judgment on this point.

MRS. RICHARDSON.—*Clerk—Moncreiff—Keay.*

No. 131.

MISS STEWARTS.—*Cranstoun—Thomson—John  
Tait.*

Competing.

*Service—Marriage-Contract—Clause—Destination.*

July 5, 1821.

—James Stewart, infest in fee-simple in the estate of Urrard, conveyed it by an antenuptial contract ‘ to  
‘ the heirs-male to be procreate betwixt the said  
‘ James Stewart and Elizabeth Robertson of this  
‘ intended marriage, and to the heirs and assignees  
‘ *whatsoever of the said heir-male, in fee,*’—whom  
failing, to the heir-male of any subsequent marriage,  
and the heirs of his body ; ‘ whom failing, or if the  
‘ said heir-male to be procreate of the body of the  
‘ said James Stewart of a subsequent marriage shall  
‘ exist, and afterwards fail by death before he is  
‘ either married or attains the age of twenty-one com-  
‘ plete, to the heir-female or eldest daughter to be  
‘ procreated of this intended marriage betwixt the  
‘ said James Stewart and Elizabeth Robertson, and  
‘ the heirs of her body, without division ; whom  
‘ failing, to the next eldest daughter of the said in-  
‘ tended marriage, and the heirs of her body, and so  
‘ on successively while any daughter of the intended  
‘ marriage exists, the eldest daughter existing al-  
‘ ways to succeed without division, as said is ; whom  
‘ failing, to the said James Stewart his own other  
‘ nearest heirs or assignees whatsoever, heritably  
‘ and irredeemably, and the said daughters or heirs-  
‘ female who succeed to the said estate always mar-  
‘ rying a gentleman of the surname of Stewart.’—  
Provisions were thereafter made in favour of the

SECOND DIVISION.  
M’K.

younger children of the marriage, on which Mrs. Richardson rested as indicative of the intentions of the granter.

James Stewart died, leaving several sons and four daughters. He was succeeded by his eldest son; but he and the other sons, and one of the daughters, died without issue. Mrs. Richardson then claimed to be served heir of provision, as the eldest daughter of the marriage, without division: and the other two sisters claimed to be served heirs-portioners and of provision, under the destination to 'the heirs and assignees whatsoever of the said heir-male, in fee.' This competition of briefs having been reported on informations, the Court, after a hearing in presence, by a majority, remitted to the macers to proceed with the service of the heirs-portioners.

RUSSELL, ANDERSON, & TOD, W. S.—TAIT, YOUNG, & LAWRIE,  
W. S.—Agents.

No. 132.

A. MURRAY, Pursuer.—*Clerk—Keay, et Alii.*  
Earl of SELKIRK and Others, Defenders.—*Cranstoun—*  
*Maitland, et Alii.*

July 6, 1821.  
FIRST DIVISION.  
Lord Balmuto.  
H.

*Fishing—Property.*—In an action by a superior heritor on the river Dee against the defenders, for removing certain cruives and yairs, the Court having decided, (18th May 1808), that fishing by yairs in that river was not illegal, nor contrary to the act 1568, they remitted to the Lord Ordinary to try whether the navigation was obstructed by those operations contrary to common law. On the report of a long proof on this point, the Court held, that no

such injury to the navigation, by these erections, had been established, as to afford ground for removal.

R. RUTHERFORD, W. S.—ALEX. BLAIR, W. S.—Agents.

Dr. R. BLAIR, Suspender.—*P. Robertson.*  
R. SIMPSON and Others, Trustees of PATERSON,  
Chargers.—*Bell.*

No. 133.

*Meditatio Fugæ Warrant.*—Paterson's trustees having obtained a decree against Dr. Blair, he left his house in Edinburgh, and retired to Berwickshire, where he had an estate. He afterwards took lodgings in the town of Berwick-on-Tweed, where he resided during the week, and came to Scotland every Sunday morning, returning to Berwick in the evening.

July 6, 1821.

FIRST DIVISION.  
Bill-Chamber,  
Lord Meadow-  
bank.

Having been apprehended on Sunday morning on a *meditatio fugæ* warrant, he, on his examination, admitted that he resided in Berwick to avoid the diligence of his creditors; and that he intended that night to go forth of Scotland. He was on this detained as in *meditatione fugæ*, and on the Monday morning apprehended on letters of caption. A bill of suspension and liberation was unanimously refused by the Court, who held the proceeding that had taken place to be regular and lawful.

JAS. GENTLE—JAS. LYON,—Agents.



No. 134.

M. WILSON, Petitioner.—*Forsyth.*

July 6, 1821.

SECOND DIVISION.

F.

*Process.*—The Court, in terms of the act of sederunt 11th March 1767, refused a petition, craving warrant to inrol a memorial and abstract in a judicial ranking and sale, in respect no cause was shown.

D. FISHER,—Agent.

No. 135.

D. M'INTOSH, Suspender.—*Buchanan.*  
A. M'LEOD, Charger.—

July 7, 1821.

FIRST DIVISION.

Bill-Chamber.

Lord Meadowbank.

D.

*Bill of Exchange—Proof.*—M'Intosh being charged for payment of a bill, presented a bill of suspension, on the ground that it had been granted partly without value, and for the accommodation of MacLeod, and offered to pay the balance. The Lord Ordinary refused the bill. M'Intosh, in a petition, referred his allegation to the oath of the charger; and the Court remitted to the Lord Ordinary to take the oath.

M'QUEEN &amp; M'INTOSH, W. S.—JAS. STUART,—Agents.

No. 136.

W. BAILLIE.—*Colquhoun.*  
J. LAIDLAW and Others.—*M'Farlane—Hope.*

July 7, 1821.

FIRST DIVISION.

Lord Alloway.

S.

*Real or Personal—Process.*—Ovans sold the estate of Whitburn to Gordon; and for a balance of £500 of the price took a bond; the debt being also, in the disposition to Gordon, and in his sasine, declared a real

burden on the lands. Laidlaw afterwards became assignee of the bond ; but the assignation did not convey or allude to the real burden. Gordon conveyed the estate to a trustee for creditors, who sold it to Baillie, by public sale ; and the question arose, Whether Laidlaw had a title to discharge and disencumber the lands of the real burden ? Laidlaw proceeded to adjust the lands ; and the trustee, to have the matter adjusted judicially, raised a multiplepoinding ; in which the Lord Ordinary found, ‘ That the trustee  
‘ acted properly in raising the multiplepoinding, as  
‘ the most speedy and effectual means of trying the  
‘ question at issue : that Mr. Laidlaw, as the assignee of Mr. Ovens, stands completely in the right of  
‘ the bond of £500, which was rendered a real burden on the lands of Townhead ; and that Mr. Laidlaw, as the creditor, had the power of receiving payment and extinguishing that obligation : that the  
‘ discharge offered by Mr. Laidlaw was sufficient to  
‘ extinguish the debt ; and that when recorded in the  
‘ register of sasines and reversions it would have  
‘ sufficiently purged the incumbrance constituted by  
‘ the sasine : therefore, prefers Mr. Laidlaw to the  
‘ sum in medio, together with interest at the rate  
‘ of five per cent., upon his executing the discharge  
‘ in question.’ To this judgment the Court adhered.

D. CLYNE—J. LAIDLAW, W. S.—A. ROBERTSON, W. S.—Agents.

No. 137.

A. C. HYNDMAN, Pursuer.—*Ro. Bell*.  
T. LESLIE and Others, Defenders.—*Hutchison*.

July 7, 1821.

SECOND DIVISION.  
M.K.

*Cessio Bonorum*.—Hyndman, pursuer of a cessio, was imprisoned on the 23d of July 1820, and liberated under a sick-bill on the 7th of August. His creditors opposed decree of cessio on the grounds of fraud, extravagance, and concealment of funds; but the Court considered their allegations too vague, and the pursuer's statement sufficiently satisfactory; and, therefore, decerned in his favour.

W. MARTIN—THOS. SMALL, W. S.—Agents.

No. 138.

J. DICK, Suspender.—*Blackwell*.  
J. DONALD, TRUSTEE for CORBET'S CREDITORS,  
Charger.—*T. H. Miller*.

July 7, 1821.

SECOND DIVISION.  
B.

*Interim Execution—Sale*.—Donald having sold a property to Dick, the latter suspended a charge for payment of the price, on the grounds, 1. That Donald's title was bad, as it had been derived from a married woman without consent of her husband, (who had fled from his creditors); and, 2. That it had not been judicially ratified by her. The Court having, in the very special circumstances of this case, repelled the reasons of suspension, and an appeal having been taken, interim-execution for payment of the expences was prayed, and granted on caution.

CUNNINGHAM & BELL, W. S.—BALLINGALL & YOUNG, W. S.—  
Agents.

LADY MARY LINDSAY CRAWFORD, Pursuer.—*Alison*. No. 139.  
COLONEL BETHUNE, Defender.—*Small Keir*.

*Prescription—Property—Barony.*—The pursuer raised an action of declarator of her right to work the coals in the lands of Radernie in Fife, belonging to Bethune of Blebo. She founded on a charter in 1621, by the Archbishop of St. Andrew's to John Lord Lindsay, on which he was infeft 'in carbonibus et carbonariis lapidibus lapide et calce villæ et terrarum de Radernie;' and on a crown-charter in 1648, which formed various lands, with the coals of Radernie, as in the above clause, into the barony of Crawford Lindsay. Neither Lady Mary, nor her ancestors, had ever wrought coal in the lands of Radernie; but they had, for upwards of 40 years, done so in the lands of Balmain, forming part of the barony.

July 10, 1821.

FIRST DIVISION.  
Lord Gillick  
D.

Colonel Bethune founded on a crown-charter in 1723, 'of all and whole a fourth part of the town and lands of Radernie, and of the coals, coalheughs,' &c.; and it was admitted by Lady Mary, that Bethune had, from 1739 to 1745, worked the coals; and that the working was occasionally renewed; but she alleged that there had been frequent and long intervals of cessation, and no actual working for 40 years. The Court, adhering to the judgment of the Lord Ordinary, held, that Colonel Bethune, by possessing the surface for 40 years under titles specially conveying the minerals of Radernie, had acquired a right to the coals in his lands; and that the work of them was *res meræ facultatis*.

GEO. LYON, W. S.—JOHN YOUNG, W. S.—Agents.

No. 140.

C. AITKEN, Suspender.—*J. Henderson, jun.*  
E. NIELL, Charger.—*D. Dickson.*

July 10, 1821.

FIRST DIVISION.  
Bill-Chamber.  
Lord Gillies.  
H.

*Semiplena Probatio.*—Elspeth Niell raised action against Aitken for aliment of a bastard child, and the Inferior Court holding the proof *semiplena*, admitted the woman's oath in supplement. The Lord Ordinary refused a bill of suspension; but the Court remitted to him to pass it.

J. MALCOLM,—JAS. PATTISON, jun.—Agents.

No. 141.

H. ROSE, Pursuer.—*Greenshields:*  
D. M'LEOD, Defender.—*Clerk—Moncreiff.*

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SECOND DIVISION.  
Lord Pitmilley.  
M'K.

*Verbal Injury.*—This was an action of damages by Rose for the alleged publication and circulation of a defamatory libel against him by M'Leod. The Lord Ordinary sustained a defence of *compensatio injuriarum*; but, on a remit from the Court, allowed Rose to put in a condescence before answer,—1. 'In regard to the way and manner in which the document libelled on came into his possession:' and, 2. 'With regard to the alleged circulation thereof by the defender.' He thereafter refused the condescence as vague and irrelevant, and assoilzied M'Leod; and to this judgment the Court adhered.

D. HORNE, W. S.—INGLIS & WEIR, W. S.—Agents.

W. DICKSON, Pursuer.—*Clerk—Currie.*

No. 142.

G. DICKSON, Defender.—*Moncreiff—J. Wilson, jun.*

*Joint Tack.*—George Dickson and John Dickson obtained a lease to themselves jointly, and to ‘their  
 ‘heirs and successors whomsoever.’ John Dickson hav-  
 ing died during the currency of the lease, the pursuer, William Dickson, was served heir in general to him. He then instituted an action of declarator, and count and reckoning, against George Dickson, to have it declared, that he was entitled to the ‘joint possession  
 ‘and management, along with the said George  
 ‘Dickson, of the lands, lime-works, and others,’ &c.  
 ‘as also, to the just and equal half of the whole pro-  
 ‘fits and issues arising from or out of the said lands,  
 ‘lime-works, and others, from and since the death  
 ‘of the said John Dickson;’ and he then concluded for count and reckoning. The Lord Ordinary hav-  
 ing decerned in terms of the declaratory conclusions, a petition was presented, on the ground, that al-  
 though the pursuer might be entitled to a share of the fruits of the farm; yet as the original joint ten-  
 ants had been engaged, independent of the lease, in trade as farmers and lime-dealers, he had no right to any profit thence arising. But the Court refused the petition, as this question was open in the accounting.

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SECOND DIVISION.

Lord Pitmilley.

F.

JOHN KERMACK, W. S.—DAV. SCOTT, W. S.—Agents.

No. 143. MRS. NASMYTH and Others, Pursuers.—*Clerk—Buchanan.*

DR. HARE and Others, Executors of Dr. Nasmyth,  
Defenders.—*R. Robinson.*

July 10, 1821.

SECOND DIVISION.

Lord Craigie.

B.

*Testament.*—‘ In obedience to the judgment’ of the House of Lords, the Court ‘ alter the interlocutor appealed from, (7th June 1816), and find the instrument, bearing date 28th September 1803, produced as the last will and testament of Dr. James Nasmyth, was revoked and annulled by him ; and that the several indorsements thereon, together with the paper produced, and insisted upon as a condition thereto, are of no avail or effect in law as testamentary dispositions ;’ and remitted to the Lord Ordinary to hear parties on the other points of the cause.\*

ROBINSON & PATERSON, W. S.—JAS. HOPF, W. S.—Agents,

No. 144, W. BELL, Advocate.—*Clerk—Forsyth.*

A. RAMSAY, Respondent.—*Baird—Moncreiff.*

June 10, 1821.

SECOND DIVISION.

Bill-Chamber.

Lord Meadow-

bank.

B.

*Advocation.*—The Magistrates of Hamilton, on the 24th of May 1821, refused Bell the benefit of the act of grace, unless he would execute a disposition omnium bonorum in favour of Ramsay, the incarcerating creditor, for behoof of all the creditors ; which having failed to do, they decerned against him for expences. On the 1st of June he presented a bill of advocation,

\* There are no papers collected in this case except the petition to apply the judgment of the House of Lords, the pleadings having been in 1816.

and obtained a sist, but without giving Ramsay's agent at Hamilton any notice of his purpose. Ramsay's agent in Edinburgh having discovered this, entered appearance in the Bill-Chamber on the same day, and immediately wrote to the agent at Hamilton, communicating the circumstance. This letter, however, was not received till the afternoon of the following day, (being the regular course of post); but a few hours previously the decree had been extracted. The Court refused the bill of advocation as incompetent, in respect of the extracted decree.

D. FISHER—A. HAY,—Agents.

J. SAUNDERS, Petitioner.—*P. Robertson,*

No. 145.

*Process—Bankrupt.*—The estate of John Saunders having been sequestrated, and his children being creditors under his marriage-contract, he prayed the Court to name a factor loco tutoris to attend to their interest. The Court refused this prayer, but named a tutor ad litem in the sequestration process.

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SECOND DIVISION.  
F.

THOS. GAIRDNER, W. S.—Agent.

T. HARKNESS, Petitioner.—*Bell—Marshall.*  
W. PAUL, Trustee for CAMPBELL'S CREDITORS, Respondent.—*Moncreiff—Jameson.*

No. 146,

*Inhibition—Bankrupt.*—Campbell, a creditor of Harkness, executed inhibition against him; and Harkness having been thereafter sequestrated, and discharged on a composition-contract, in which all preferences, whether by inhibition or otherwise, were

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SECOND DIVISION.  
F.



reserved entire, the Court, in respect of ‘ no objection being made, restrict the inhibition to a security for payment of the composition.’

A. MANNERS, W. S.—CAMPBELL & CLASON, W. S.—Agents.

No. 147.

W. M’KECHNIE, Pursuer.—*Jardine*.

W. C. C. GRAHAM and Others, Defenders.—*Keay*.

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FIRST DIVISION.

Lord Gillies.

H.

*Tailzie—Excambion*.—Mr. Graham possessed the estate of Gartmore under a strict entail, and he was also proprietor in fee-simple of the lands of Gartschell, lying contiguous to the mansion-house of Gartmore. He sold Gartschell to M’Kechnie and six other persons, in seven different lots, making it a part of the bargain that each of these individuals should reconvey to him their respective lots in excambion for certain parts of the entailed estate, according to the statute 10. Geo. III, c. 51. The excambion was made in the usual mode, under the sanction of the Sheriff of the county. M’Kechnie having afterwards acquired the seven different lots of the entailed lands, excambied for those held in fee-simple; and entertaining doubts of the validity of the transaction, brought an action of declarator of his right against the heirs of the estate of Gartmore; in which the Court decerned in his favour.

GEO. DUNLOP, W. S.—WALTER DICKSON, W. S.—Agents.

**LORD and LADY ELIBANK, and Others, Pursuers.—** No. 148.

*Cranstoun—Moncreiff—Walker.*

**G. PENTLAND, Defender.—***Clerk—Fullerton.*

*Tailzie—Tack.*—Lord and Lady Elibank, by a missive, let to Pentland the entailed estate of Bachilton, belonging to Lady Elibank, on an improving lease, in terms of 10. Geo. III, c. 51; the option of the length of the lease being with Pentland, and interest allowed on money laid out on buildings. The Royal Exchange Assurance Company had previously got a disposition in security of these lands, in which they were infest, and drew the rents. Pentland raised an action of declarator and implement, concluding for a lease of 31 years. Lord and Lady Elibank, with the Assurance Company, raised a reduction of the lease, as contrary to the entail, and to 10. Geo. III, c. 51, as unequal and unjust, obtained through force and fraud, and as impairing the prior security of the Assurance Company. But the Court repelled the reasons of reduction; and in the declarator decerned in terms of the conclusions for obtaining a tack and possession of the lands.

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FIRST DIVISION.  
Lord Alloway.  
H.

Observed on the Bench, that a lease entered into bona fide, and without the collusive design of defeating the rights of creditors, was an ordinary act of administration, with which the creditor could not interfere.

**J. & C. NAIRNE, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.**  
—WILLIAM DOUGLAS, W. S.—Agents.

No. 149.

A. LACHLAN, Petitioner.—*Grahame Bell*.

July 11, 1821.

FIRST DIVISION.

D.

*Cessio Bonorum—Liberation.*—Lachlan, a custom-house officer, having raised a summons of cessio bonorum, and his condescendence having been taken out to see by an opposing creditor, the Court refused a petition for liberation during the long vacation, although it was said that the creditor had agreed to withdraw opposition, on receiving an assignation to a part of his future salary, if re-instated in his place, which he had forfeited by his incarceration.

JOHN ANDERSON, W. S.—

—Agents.

No. 150.

J. RANKINE and his TRUSTEE, Petitioners.—*Jardine*,

July 11, 1821.

FIRST DIVISION.

S.

*Bankrupt—Process.*—Rankine having been sequestrated, offered a composition, which was accepted by all his creditors except Dr. Henderson, who, as trustee for children, held a claim amounting to one-third of the whole debts. This person being, in consequence of a paralytic stroke, incapable of transacting business, the Court, on advising a petition for approval of the composition, ex proprio motu appointed a curator ad litem for the children.

JAS. HERIOT, W. S.—Agent.

No. 151.

J. MACKAY and his TRUSTEE, Petitioners.—*More*.

July 11, 1821.

SECOND DIVISION.

B.

*Bankrupt.*—The petitioner, a bankrupt under sequestration, offered a composition of 6s. 8d. per pound on all his debts, with security, which his creditors en-

tertaind, and appointed a meeting to be held on the 18th July to decide on it. A petition having been presented by him and his trustee, craving warrant to the Lord Ordinary on the Bills during the vacation to receive a petition for having the same confirmed, if accepted by the creditors, the Court refused the same.

W. DYMCK, W. S.—Agent.

J. LOCH, Complainer.—*Murray.*

No. 152.

FREEHOLDERS of DUMBARTONSHIRE, Respondents.—

*Freehold Qualification.*—Decree, (in absence), or- July 11, 1821.  
daining the petitioner to be admitted to the roll of SECOND DIVISION.  
freeholders of the county of Dumbarton, from which M.K.  
he had been excluded by them, on the grounds, 1. Of  
his titles being nominal and fictitious; and, 2. That  
there was no evidence that he had in his person a  
real estate, and was in possession of that on which  
he claimed.

GEO. DUNLOP, W. S.—

—Agents.

J. SPENCE, Petitioner.—*Baird.*

No. 153.

J. MACKENZIE and Others, Respondents.—*Bell—  
Hunter.*

*Inhibition.*—James Spence was a joint obligant with July 11, 1821.  
his brother, John, in a personal bond for £500 to SECOND DIVISION.  
Mackenzie, &c. payable on the death of the last of R.  
four individuals, the youngest of whom was then 58  
years of age.

John Spence becoming bankrupt, and an action of

reduction having been raised of a testament, by which James had right to a considerable fortune, the creditor demanded from him either a new coobligant or payment; which being refused, inhibition was executed against him. Having applied to have it recalled as nimious, the Court refused to do so except on caution.

WM. DALLAS, W. S.—RODR. M'KENZIE, W. S.—Agents.

No. 154. D. BELL and Others, Complainers.—*P. Robertson.*  
J. SIME and Others, Respondents.—*Ivory.*

July 11, 1821. *Interdict.*—Decree, (of consent), assoilzieing the de-  
SECOND DIVISION. fenders, with expences, from a petition and complaint  
B. at the instance of the complainers, deacons of three  
of the trades of Dundee, who complained of a breach  
of interdict which they had obtained against the re-  
spondents, deacons and box-masters of the other six  
trades, against doing any act or deed inconsistent  
with the constitution and laws of the incorporated  
trades, as established by immemorial usage.

THOS. MEGGET, W. S.—J. IMRIE,—Agents.

No. 155. D. GORDON, Petitioner.—*Bell—A. Bell.*  
M. HYSLOP and Co., Respondents.—*M'Neill.*

July 11, 1821. *Execution Pending Appeal—Stat. 48. Geo. III, c.*  
SECOND DIVISION. 51.—Gordon having raised an action of count and  
M'K. reckoning against Hyslop and Company, he got two  
interim-decrees, the one for £1,000, (which he reco-  
vered), the other for £1,600, (which he did not ex-  
tract), on caution to repeat in the event of a reversal

on a final adjustment of the accounts; and he was found entitled to expences, subject to modification. At this stage an appeal was taken by Hyslop and Company to the House of Lords; and Gordon having prayed the Court to award interim-execution as to the £1,600, and to modify and decern for the expences,—

The Court granted interim-execution as to the £1,600 on caution; but refused the application *quoad ultra*.\*

It was remarked, that the case being now removed to the House of Lords, it was quite incompetent to decide any thing farther as to the expences.

VANS HATHORN, W. S.—JOHN THORBURN,—Agents.

A. FRASER and Others, Pursuers.—*M<sup>c</sup>Kenzie*.  
Sir J. L. JOHNSTONE'S TRUSTEES, Defenders.—  
*Fullerton*.

No. 156.

*Title to Pursue*.—John Baker of London died possessed of leasehold property there. Alexander Murray married the heiress of John Baker, and acquired possession of the property. Murray died without issue, having nominated Governor Johnstone to be his executor, leaving to him the liferent, and to Lord Elibank the fee of his estate. Governor Johnstone took posses-

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SECOND DIVISION.  
Lord Pitmilley.

\* In the petition for Gordon it is stated, that he objected in the House of Lords to the competency of the appeal on the 48. Geo. III, c. 51, § 15, as the case was not final, the Court of Session not having decerned for expences, but only found them due, subject to modification. But (it is said) the Committee of Appeals found the appeal competent, as the question of expences could not be considered '*moris of the cause* within the words of the statute.'

sion and intromitted with the estate; and he died, after appointing John Johnstone of Alva to be his executor, into whose hands the estate came. After Johnstone's death, it was transferred to Sir William Pulteney, his executor, who accounted for it to Sir J. L. Johnstone, son and heir of Governor Johnstone; and, he having died, the estate came into the possession of the defenders, his trustees.

Fraser, as attorney of Lord Elibank, obtained letters of administration to the estate of the original testator, Murray; and thereafter, as administrator of Murray, he got letters of administration to a part of the estate of Baker, who had died indebted to Murray. Under these titles Fraser and Lord Elibank raised an action of count and reckoning against Sir J. L. Johnstone's trustees. They objected,—1. That the letters of administration gave no title to pursue; and, 2. That all parties had not been called, as neither the representatives of Johnstone of Alva nor of Sir William Pulteney were parties to the action.

The Lord Ordinary found, 'that the pursuers ' have produced a sufficient title to insist in the present action, and that the proper parties have been ' called as defenders.' To the first of these findings the Court adhered, it having been unnecessary to decide on the second, as the pursuers obviated the objection by calling the parties.

WALTER DICKSON, W. S.—DALLAS, INNES, & HOGARTH, W. S.  
—Agents.

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## ERRATUM.

P. 15, (near middle), transpose 'M'Kenzie' to the end of the preceding line.



# THE CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1821-1822.

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W. M. SPALDING and TUTOR.—*A. Murray.*

No. 157.

A. SMALL and Others.—*Small Keir.*

Competing.

*Clause.*—The estate of Ashintully having been judicially sold, George Spalding, as heir-at-law, (failing a fatuous heir), had right to the reversion of the price. In his daughter's contract of marriage with Small, he bound himself to convey to him and others 'a proportional share of the reversion of the estate of Ashintully that has already or may happen to fall unto him or his family.' For many years the reversion of the price remained in the hands of the purchaser, and the accruing interests were drawn for the fatuous heir, still in apparenacy. The widow of the party last infest had a claim for terce, which formed a burden on the reversion. Both the fatuous heir and the widow having died, a multiple-

Nov. 13, 1821.

FIRST DIVISION.

Lord Gillies.

D.

poin ding was raised by the purchaser, in which it was found that the price was exhausted ; and that there only remained the savings of interest, (which were held to be executry of the fatuous heir), and a part of the sum appropriated for the widow. As one of the executors of the former, the representative of George Spalding (now dead) drew a share ; and as disponee of the widow, he received the balance due to her for terce. Small and others thereafter, under the above clause, claimed a share of these sums from the heir of George Spalding, who brought a multiplepoin ding to ascertain their right, in which the Lord Ordinary found, ‘ that no part of the terce, ‘ or allowance in lieu thereof, which belonged to ‘ Grizel Lyon, (the widow), or of the interest that ‘ accrued during the lifetime of David Spalding, the ‘ fatuous heir, is to be considered as forming a part ‘ of that reversion, or as falling under the convey- ‘ ance in the contract of marriage.’ And the Court adhered.

LOCKHART & KENNEDY—BROWN & LAWSON, W. S.—Agents.

No. 158.

J. BARR, Pursuer.—*P. Robertson.*

M<sup>c</sup>ILWHAM and SPEIRS,—Defenders.—*Erskine.*

Nov. 13, 1821.

FIRST DIVISION.  
Lord Alloway.  
S.

Barr, M<sup>c</sup>Ilwham, and Speirs entered into a copartnery as spinners, which was soon thereafter dissolved. An action of count and reckoning was then brought by Barr against his partners, in which he made various claims against them. In the greater part of these he was unsuccessful ; but as the case was involved in special circumstances, and no general

point was decided, it is unnecessary to notice them more particularly.\*

J. R. STODDART, W. S.—J. SMYTH, W. S.—Agents.

BREBNER and HADDEN, Petitioners.—*Moncreiff—Lumsden.* No. 159.

J. PATON, Respondent.—*Forsyth.*

*Inhibition.*—Brebner and Hadden held a lease of lands from Paton, on which they had erected spinning and bleaching manufactories. An agreement was afterwards entered into, by which Paton bound himself to grant to Brebner and Hadden a feu-charter of the lands, while they were to pay a certain feu-duty. The parties having disagreed as to the terms of the charter, an action for implement was raised by Brebner and Hadden; and a petitory one for the feu-duties by Paton. One of the chief conditions (it was said) which Paton had bound himself to insert in the charter, was to warrant to Brebner and Hadden the use of the water of the river Don, and canals for conveying it. Against using the water they were interdicted by conterminous proprietors. During the dependence of the above actions, Paton executed an inhibition against Brebner and Hadden, who presented an application for having it recalled. This the Court granted, in respect, 1. That Paton had not yet implemented his part of the agreement, by granting a feu-charter; while he had ample security over buildings on the lands: and, 2.

Nov. 13, 1821.

FIRST DIVISION.  
S.

\* The Court, in one of their interlocutors, found, that the bell of a spinning manufactory was a fixture.

- That Brebner and Hadden had been interdicted from the use of the water.

DALLAS & INNES, W. S.—FALCONER & JOHNSTON, W. S.—  
Agents.

No. 160.

W. MOWBRAY.—*Cranstoun—Jeffrey—More.*

A. BRUCE.—*Moncreiff—Jameson.*

Competing.

Nov. 13, 1821.

SECOND DIVISION.

M.K.

*Bankrupt—Trustee.*—Smith having become insolvent, his creditors resolved that he should be continued in the management of his affairs, under the superintendence of Mowbray, who was, in cases of difficulty, to consult with a committee. Their object was to equalize the payment of his debts. After Mowbray had acted for some time, Smith's estate was sequestrated; and Mowbray was appointed interim-factor. A competition arose between him and Bruce for the office of trustee. At the meeting for the election, Bruce's party objected, 'that Mr. Mowbray was ineligible to the office of trustee, for reasons stated, and to be farther stated, at the discussion of that personal objection;' and they 'protested, that any creditor who voted for the said William Mowbray after the statement of this objection, threw away his vote.' Each of the competitors presented a petition for confirmation. Mowbray had the apparent majority of votes; but Bruce alleged he was ineligible on these grounds.—

1. That while the estate was under his superintendence he had allowed undue preferences, for which he was responsible.

2. That he was bound to account for his manage-

ment of the estate during that period to the person who should be named trustee.

3. That prior to his election as interim-factor, he had become arbiter in a submission between the bankrupt and one of his creditors, in which, after he had obtained that office, he had pronounced a decree which was now under reduction by the creditor: And,

4. That while acting as interim-factor, he had devolved the whole charge of the estate on the bankrupt.

The Court found, 'that, under all the circumstances of the case, Mr. Mowbray is not capable to be elected trustee on the sequestrated estate;' and confirmed Bruce in that office.

D. MURRAY, W. S.—T. JOHNSTONE,—Agents.

R. HILL, Pursuer.—*Maidment*.

No. 161.

J. THOMSON and Others, Defendants.—*Alison*.

In an action of multiplepounding raised by Hill as to part of the price of certain lands, he objected to consignment, on the allegation that he had granted a bond of caution for it, of which he was entitled to redelivery before consigning. The Court ordered consignment; 'it being expressly declared, that on such consignment being made, the bond of caution for the price of the lands of Northshiels, said to have been granted by Mr. Hill, with a cautioner, (if any such exists), shall become of no force or effect.'

Nov. 13, 1821.

SECOND DIVISION.

Lord Glenlee.

M'K.

R. HILL, W. S.—CAMPBELL & ARNOTT, W. S.—Agents.



**No. 162. HAVELLAAR and VAN DULKEN, Pursuers.—Gordon.**  
**P. HODGE, Defender.—H. Lumsden.**

Nov. 13, 1821.

SECOND DIVISION.

Lord Cringletie.

M'K.

*Freight.*—The pursuers sold goods to Hodge, which they shipped from Rotterdam to Leith. The vessel was wrecked off the Texel, but the goods were saved and landed at Amsterdam. Part having been damaged, was there sold under judicial authority; and the remainder was sent back to Rotterdam, whence it was safely transported to Leith in another vessel. Freight, according to the distance, having been paid by the pursuers between Rotterdam and Amsterdam, they claimed repayment from Hodge, who resisted it as not legally due. The Lord Ordinary decerned against him, on the ground, that the pursuers, acting bona fide for Hodge, received the goods at Amsterdam for him, where they would not probably find a ship bound for Leith, and took them to Rotterdam, where a ship was easily found; and, of course, having received the goods, they had to pay freight pro rata itineris.' The Court adhered.

ROBINSON & PATERSON, W. S.—JOHN YOUNG, S. S. C.—Agents.

**No. 163. EARL of KELLIE and Others, Petitioners.—Forsyth**  
**—Moncreiff.**

**J. CRAWFORD, Trustee on Meldrum's Sequestrated Estate, Respondent.—Bell—Skene.**

Nov. 13, 1821.

SECOND DIVISION.

M'K.

*Bankrupt—Sequestration—Personal Objection.*—Meldrum executed a trust-disposition for behoof of his creditors in favour of the Earl of Kellie and others, to which the great majority of the creditors

acceded. The trustees were infest, and acted for many years. Thereafter Meldrum, with the concurrence of a posterior and non-acceding creditor, obtained a sequestration of his estates under the bankrupt-act. The trustees presented a petition for recall of the sequestration, on the grounds,—

1. That Meldrum was barred *personali exceptione* from applying for a sequestration after granting the trust-deed.

2. That he was not liable to be sequestrated.

The Court repelled 'the preliminary objection to the sequestration, that it was applied for by Robert Meldrum, after granting a voluntary trust-disposition for behoof of his creditors.' But found, that neither as agent for the Bank of Scotland,—nor as a brickmaker,—nor as an auctioneer guaranteeing sales,—nor as a commercial agent,—was he liable to be sequestrated under the bankrupt-act; and, therefore, recalled the sequestration.

T. MARTIN—T. WALKER,—Agents.

OFFICERS of STATE,—*Lord Advocate—Solicitor-General—Gordon.*

No. 164.

J. GORDON of Clunie.—*Cranstoun—Jeffrey—P. Robertson.*

*Patronage.*—In 1740, the Court of Teinds annexed the greater part of the parish of Kinnernie to Midmar, and the remaining part to Clunie. The patronage of Kinnernie belonged to the Crown; and that of Clunie was divided between Gordon of Clunie and Fraser of Inverallochy, who presented *alternis vicibus*. A vacancy having occurred in Clunie in

Nov. 13, 1821.

SECOND DIVISION.

Lord Cringletie.

B,

1742, Gordon, the proprietor, presented one person, and an adjudging creditor of the estate of Clunie presented another. The presbytery, by a call of the parish, preferred the presentee of the creditor. In 1795, another vacancy occurred, which was filled up by Fraser, the other patron;—the Crown, however, entering a protest against any implied dereliction of its right of presentation. Another vacancy having taken place in 1820, and both the Crown and Gordon having presented, mutual declarators of their rights were raised. Gordon concluded to have it found,—

1. That the Crown had no patronage in the united parishes.
2. That, at least, the Crown had only right to present once in every five vices.
3. That the present vice belonged to him.

On the other hand, the Officers of State concluded to have it declared,—

1. That the Crown was entitled to present on every third vice.
2. That as Gordon had presented in 1742, and Fraser in 1795, the present vice belonged to the Crown.

The Lord Ordinary having reported the case, the Court decerned in terms of the declarator by the Officers of State, and assqilzied them from that at the instance of Gordon.

Observed, that where the Crown and a subject have alternate vices, the first belongs to the Crown; but that as the first had been here exercised by a person in right of the estate of Clunie, and the second by the other patron, the vice now fell to the Crown.

A. CAMPBELL, W. S.—J. S. ROBERTSON, W. S.—Agents.

J. SWAN and Others, Pursuers.—*Baird*.

No. 165.

K. M'KENZIE and J. AIRD, Defenders.—*Solicitor-General—Forsyth—M'Neill*.

*Burgh Royal—Statutes 39. & 40. Geo. III, c. 86, and 41. Geo. III, c. 53.*—By these statutes, the chief magistrate of every city is required to choose and appoint an inspector of hides, and to supply all vacancies within his district, out of a leet of two persons presented by a certain number of the masters manufacturers of leather, or, in case of difference of opinion, by the majority, ' who shall be then residing ' and carrying on such trade or manufacture with- ' in such city, &c., and who shall respectively have ' delivered in writing their respective names and ' places of abode, and occupations.' By the last of the above statutes the masters workers in leather are allowed to join in recommending; but it is specially provided, ' that no recommendation shall be ' good, unless three tanners, skimmers, curriers, or ' other persons manufacturing leather, at the least, ' shall join in such recommendation.'

Nov. 14, 1821.

FIRST DIVISION.

Lord Alloway.

D.

In 1818, the office of inspector of hides in Edinburgh became vacant. Two lists were delivered to the Lord Provost,—one recommending Lawson, and another recommending Aird. The Provost preferred Aird. An action of reduction of his appointment, of declarator, and of count and reckoning, was then brought against the Provost and Aird by the manufacturers of leather. The chief ground of reduction was, that the recommendation was not in terms of the statutes; for although it was signed by five persons as manufacturers of leather, yet two of them

were not entitled to that character, and one had withdrawn his name before the nomination.

The Lord Ordinary reduced the appointment, in respect ' only two of the persons said to be manufacturers of leather recommending Aird mention their occupations, and the place of residence of none of them is mentioned: that the recommendation in favour of Aird is not subscribed by three persons manufacturing leather, as required by the statute, in respect it is admitted that Leammouth and Sons are not tanners, but that the tanning business is carried on under a different firm; and in respect that Falconer had withdrawn his name by letter to the Lord Provost before the nomination took place; and in respect that it is not denied that Welsh had not been a manufacturer of leather for twenty years past.' His Lordship also pronounced a special judgment on the conclusions of the declarator, and of count and reckoning; but these being departed from, the Court found, ' that in respect the defender, John Aird, was not recommended by the majority, in terms of the statute, his nomination is null and void, and adhere to the Lord Ordinary's interlocutor, in so far as regards the said nomination, and reduce, decern, and declare accordingly; and of consent of the respondents, (pursuers), find it unnecessary to decide any other points in the cause.'

GEORGE COMBE—JAMES MALCOLM,—Agents.

Mrs. A. M'CALLUM, Pursuer.—*Cranston—M'Neill.* No. 166.  
G. BAILLIE, Defender.—*Jeffrey—More—Sandford.*

Baillie having been employed by M'Callum as a Nov. 14, 1821.  
writer to recover certain debts due to him, an action  
FIRST DIVISION,  
of accounting was brought against him by M'Callum's Lord Alloway,  
widow. Baillie alleged that M'Callum was his debtor ;  
H.  
and the Lord Ordinary, after a report by the auditor  
of Court in favour of Baillie, assoilsied him ; and the  
Court adhered.

W. DUNCAN—J. JONES,—Agents.

J. TAYLOR, Suspender.—*P. Robertson.* No. 167.  
A. JACK, Charger.—

*Sale.*—Dow having been imprisoned for debt, Nov. 14, 1821.  
Taylor gave him a bill, from the proceeds of  
FIRST DIVISION,  
which he was liberated. Thereafter two horses, Lord Gillies.  
with their halters, which were in the possession  
of Dow, were pointed by Jack. Taylor applied for  
an interdict against the sale of them, on the ground  
that he was the owner, as Dow had conveyed  
them to him in payment of the bill ; and that he  
had taken actual possession, by laying hold of the  
horses by the ears, and thereafter had hired them  
out to Dow. After some procedure, the inferior  
court found, in the circumstances of the case, ' that  
' no valid sale was accomplished, but a collusive  
' transference merely was attempted ;' and, therefore,  
dismissed the petition, and found Taylor liable in  
expences, which were afterwards modified and de-  
cerned for. Being charged for these expences, he

suspended, but the Lord Ordinary repelled the reasons ; and the Court adhered.

J. M'KENZIE—J. M'DONNELL, W. S.—Agents.

No. 168.

A. BINNY, Advocate.—*Fletcher*.  
JANET KENNEDY, Respondent.—*Currie*.

Nov. 14, 1821.

FIRST DIVISION.  
Bill-Chamber.  
Lord Meadowbank.  
S.

*Semiplena Probatio*.—In an action brought by Janet Kennedy against Binny, for aliment of her bastard child, the inferior court, after leading a proof, from which it appeared that an uncommon degree of familiarity had subsisted between the parties, considering the difference of their situations in life,—that on one occasion they had been seen together in suspicious circumstances,—and that Binny had, in his judicial declaration, denied circumstances which were shewn to be true, held the proof of the paternity to be *semiplena*, and allowed Kennedy to give her oath in supplement. A bill of advocacy of this judgment having been presented, it was refused by the Lord Ordinary ; and the Court adhered.

GREIG & PEDDIE, W. S.—L. & C. GORDON,—Agents.

No. 169.

EARL of STRATHMORE,—*Hamilton—Baird*.  
and  
OFFICERS of STATE, Suspenders,—*Solicitor-General*.  
W. LAING, Charger.—*Rutherford*.

Nov. 14, 1821.

SECOND DIVISION.  
Bill-Chamber.  
Lords Cringletie  
and Meadowbank.  
B.

*Poinding—Abbey—Palace*.—The Earl and Countess of Strathmore resided, under a royal warrant, in the palace of Holyroodhouse. They went to England on the 8th July 1820, and on the 8th Septem-

ber, Laing, a creditor, charged them, on induciæ of six days, by leaving a copy of a charge of horning in their apartments in the palace. On the expiration of the charge, he, under the sanction of the bailie of the sanctuary, attempted a poinding of their effects situated there. A bill of suspension was presented, on the grounds,—1. That the charge ought to have been on induciæ of sixty days : 2. That it was illegal to execute a poinding within the sanctuary; and, 3. That it was also illegal to do so within the royal palace.

The Lord Ordinary refused the bill, ‘ to the effect that the respondent may execute his poinding, re-serving all objections to its validity.’

While an order by the Court to answer a petition against this judgment was current, Laing endeavoured to carry through a new poinding after a charge of sixty days. Bills of suspension were thereupon presented by the Earl of Strathmore, and by the Officers of State, which the Lord Ordinary refused. The Court adhered to the Lord Ordinary’s judgment as to the first bill, in respect no caution was offered, but passed the other two.

The Judges were agreed that it was legal to execute a poinding within the *sanctuary*; but there was a difference of opinion as to the legality of a poinding within the *palace*; and the bill of suspension by the Officers of State was passed to try that question.

J. HAMILTON, W. S.—F. WILSON, W. S.—A. STEELE, W. S.—  
Agents.



No. 170.

A. and A. SCEALES and SONS.—*More.*  
 A. RUSSELL and Others.—*Bell—Ivory.*  
 Competing.

Nov. 15, 1821.

FIRST DIVISION.

Lord Gillies.

D.

*Arrestment—Competition.*—John M'Kenzie, owner of a schooner, granted, in May 1816, along with his father, a bill to Sceales and Sons, for furnishings to the vessel. The bill was payable in May 1817; but John M'Kenzie died before that time, and it was protested for non-payment. On the death of John, his father and brothers took possession of the vessel, and thereafter granted their bill as 'the heirs of the late John MacKenzie,' both for the above debt, and also for another which Sceales and Sons had constituted against them on the passive titles. Letters of horning and of arrestment were issued on this bill on 17th March 1818, and the vessel was then arrested by Sceales and Sons. On the 10th of June 1818, one of the brothers got himself confirmed executor of John M'Kenzie, and several creditors of the deceased liquidated their debts against him. Sceales and Sons having claimed a preference over the vessel, she was sold, and the price deposited in a bank, to await the decision of the Court. A multiplepinding was raised, in which the other creditors maintained that they were entitled to be ranked preferably, or, at least, *pari passu* with Sceales and Sons, in respect their debt had never been constituted against the executor; and, consequently, that the arrestment was inept. But the Lord Ordinary preferred Sceales and Sons *primo loco*; and to this judgment the Court adhered.

R. M'KENZIE, W. S.—A. NAIRNE, W. S.—Agents.

J. HYSLOP, Pursuer.—*Moncreiff—Ivory.*  
 MRS. H. SMALL, Defender.—*Cranstoun—Ro. Bell.*

No. 171.

*Jus Crediti—Husband and Wife.*—John Dickson and Elizabeth Gray, his wife, were infest in an heritable property acquired during the subsistence of the marriage, ‘in conjunct fee and liferent,’ for the said Elizabeth Gray’s liferent-use allenary, and to the bairns procreated or to be procreated of the marriage, in fee. They had a son, Robert, who was married to the defender, Helen Small; and two daughters, Marion and Martha, of the former of whom Hyslop, the pursuer, was the son. In 1811, the spouses executed a deed, which bears, ‘that considering there was no contract of marriage betwixt us, and that hitherto we have made no settlement so as to regulate our affairs at death, &c.; therefore, we hereby dispo, assign and make over to and in favour of each other, and to the longest liver, in liferent, during all the days of the life of the longest liver, and after the decease of both, to John Rutherford, as trustee, &c. all and whole the heritable and moveable property which shall belong to us, or either of us, at the death of the longest liver; and, without prejudice to the said generality, all and whole our said tenement,’ &c. The purposes of the trust were, 1st, ‘For the use and behoof of Robert Dickson, our son, presently a serjeant of cavalry serving at Madras in the East Indies, to whom the said John Rutherford shall be bound and obliged to dispo and assign both the heritable and moveable subjects hereby conveyed upon his return to Britain, on requiring him so to do;’ ‘and in case of the decease of the

Nov. 15, 1821.

FIRST DIVISION.  
 Lord Alloway.  
 H.

‘ said Robert Dickson without children, we direct  
‘ and appoint our trustee to dispoſe the heritable  
‘ ſubjects or houſes belonging to us, to the ſons or  
‘ male-children of the ſaid Marion and Martha Dick-  
‘ ſons, our daughters, equally among them.’ The  
deed contained a precept of ſaſine. The wife ſoon  
thereafter died, and after her death John Dickſon  
corroborated the above deed. His ſon, Robert, on  
his return from India, alſo died leaving no iſſue:  
and within a few days after this event John Dick-  
ſon ſold the ſubjects to one Hay, who granted him an  
heritable bond over them for part of the price, which  
he aſſigned to the defender, Small, who lived in fa-  
milia with him, and was alleged to have concerted  
this proceeding. She was infeſt on the bond. On  
the death of John Dickſon, the ſon of his eldeſt  
daughter brought a reduction of the ſale, and of the  
heritable bond aſſigned to Mrs. Small, on various  
grounds; but particularly, that John Dickſon had no  
power to ſell; and that, at all events, the purſuer had  
a *jus crediti* over the price, as a ſurrogatum for the  
ſubjects, not to be defeated by the gratuitous assign-  
ation to the defender. The Lord Ordinary found,  
‘ that by the mutual deed, which is equivalent to a  
‘ marriage-contract, and by which the liferent was  
‘ veſted in the ſurviving parent, and a trustee ap-  
‘ pointed for carrying it into effect, Robert Dickſon,  
‘ (if he had ſurvived his father), and the purſuer,  
‘ Hyslop, and the different heirs of the marriage ſub-  
‘ ſtituted to him in the event of his death, had a *jus*  
‘ *crediti*, which could have prevented John Dickſon,  
‘ as the liferenter, from gratuitouſly altering that  
‘ deed; but that this was a latent deed upon which  
‘ no titles were completed; and that Hay was entitled

‘ to trust to the records, and to purchase from John Dickson those subjects which were feudally vested in him,—therefore, finds that sale effectual, unless the pursuer shall undertake to prove John Dickson’s mental incapacity to enter into such a transaction, or that the sale was simulate or fraudulent : and finds, that the funds, and especially the heritable bond left by John Dickson, are responsible as a surrogatum to those persons who have the jus crediti under the contract of marriage.’ To this interlocutor the Court adhered.

JAS. MALCOLM—JOHN DICKIE, W. S.—Agents.

T. THOMPSON, Pursuer.—*Blackwell.*

M. PEARSON and Others, Defenders.—*Jardine.*

No. 172.

*Payment.*—Thompson raised action against Pearson and others, road-trustees, with whom he had contracted to make repairs on a road, for a balance of £100 due to him. Their defence was, that they had paid this balance to Russell, who was employed by Thompson as a sub-contractor ; and that Thompson being indebted to him to that amount, could not allege any injury. The Lord Ordinary, after ordering a condescence of the debt said to be due by Thompson to Russell, found, ‘ that Thompson, as the contractor with the trustees, was responsible for the sufficiency of the work, and entitled to draw the different instalments which became due : that Russell’s only direct claim for payment lay against Thompson ; and that the trustees, in making the payment of £100 to Russell, did so entirely at their own risk, especially after Thompson put them on their guard, by

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‘ desiring them not to do so : that the trustees are  
 ‘ not entitled to take credit, in accounting with  
 ‘ Thompson, for the £100 which they paid to Russell,  
 ‘ unless they can show that Thompson has not been  
 ‘ injured by that payment : that the trustees have  
 ‘ not established that a balance of £100 was due by  
 ‘ Thompson to Russell, as Thompson was entitled  
 ‘ to deduction of £91 paid by him for rebuilding the  
 ‘ walls, found to have been insufficiently built by  
 ‘ Russell ;’ and he, therefore, decerned against the  
 trustees. To this interlocutor the Court adhered.

—JOHN LAWSON, W. S.—Agents.

No. 173.

P. MASON, Petitioner.—*Forsyth.*

MAGISTRATES of MONTROSE, Respondents.—*Clerk*  
 —*Ivory.*

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 S.

*Burgh Royal—Process.*—In 1817, a royal warrant, containing a new sett of the burgh of Montrose, was granted by the king in council, in consequence of the election of magistrates in 1816 having been found null. Under it an election took place at Michaelmas 1820, against which Mason, a constituent member of the meetings for annually choosing the magistrates, and a member of the town-council, presented a petition and complaint on the following grounds.—

1. That Dr. Gibson was not eligible to the office of provost, to which he had been chosen, because he was not a resident burgess or guild-brother, but had only some years previously been presented by the magistrates with an honorary burgess-ticket.

2. That Allardyce, who was elected a trades-coun-

cillor, was not an operative craftsman, as required by the new constitution.

3. That, by the sett, ' the provost, bailies; treasurer, and hospital-master, shall not be continued in their offices longer than two years together, but they, with the dean of guild, shall remain ex officiis members of the council for the year immediately following that in which they shall have served in these offices respectively.' But that, notwithstanding, Robb and Crawford, who were bailies from Michaelmas 1818 till 1820, had been elected, the one to be treasurer, and the other to be hospital-master.

4. That the whole election made by the guildry was illegal, because the majority of the voters held merely honorary burgess and guild-tickets, which they had obtained as an inducement to enter certain regiments of volunteers formerly raised.

The Court, however, dismissed the complaint, being satisfied that Dr. Gibson had for many years enjoyed all the privileges of a trading burgess, in the importation and sale of medicines; that he constantly resided within the burgh; that he had been a member of the council for two previous years; and that he had lately paid the regular dues of admission. 2. That Allardyce was an operative craftsman, though he, in addition, exercised some other employments. 3. That the election of Robb and Crawford was not illegal under the new sett: And, 4. That the freedom of the burgh having been conferred on the volunteers as a bounty for their services, they were entitled to all the privileges of freemen. But while the Court refused the petition, they declared, ' that by entertaining this question under the authority of the election statutes, and giving judgment on this pe-

‘tition and complaint, they do not consider themselves as giving any opinion upon, much less recognising, the legality of the late royal warrant, whereby the old sett of the burgh was changed.’ In a reclaiming petition Mason further urged, that the new sett of the burgh being illegal, the Court could not competently sustain any election made under it. The Court, however, considering that this question could be tried only in an action of reduction, and not in a summary petition and complaint, and as it did not appear that Mason had any other title to pursue than that which he possessed under the new sett, refused the petition without answers.\*

DALLAS & INNES, W. S.—GIBSON, CHRISTIE, & WARDLAW,  
W. S.—Agents.

No. 174. W. JEFFREY, (D. M'MILLAN'S TRUSTEE), Pursuer.—  
*Forsyth.*

P. and W. CREIGHTONS, Defenders.—*More.*

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Lord Cringletie.  
B.

*Bankrupt—Reduction on Act 1696, c. 5.*—This was a dispute as to whether certain heritable property belonged to D. M'Millan, the bankrupt, or to D. M'Millan and Company, of which he was a partner. The case, which was of a special nature, arose out of these circumstances :—B. Mathie was feudally vested in the pro-

\* A prejudicial question was urged by the magistrates, that after the service of the petition and complaint, Mason had bound himself to withdraw it on certain conditions, with which they were still ready to comply. Though the case was decided on the merits, yet a majority of the Court were of opinion that Mason was bound by this agreement.

perty, and agreed, by missive, to dispoise it to Wyld. A similar obligation was granted by Wyld to D. Mac-Millan and *Son*. This company was composed of D. M'Millan, senior and junior (father and son). The father having died, the son carried on business under the old firm. Becoming insolvent, he was discharged of the debts both of the old company and of that carried on by himself, on granting composition-bills. He then entered into partnership with one Watson, under the firm of D. M'Millan and *Company*; and it was alleged that this company paid off the composition-bills, and that D. M'Millan had on that account agreed to transfer the property to it; but no missive was ever granted. Creightons, the defenders, being creditors of D. M'Millan and *Company*, got from D. M'Millan (2d October 1812) a missive, under the firm of D. M'Millan and *Son*, conveying the property in security, on which they obtained a regular title from Mathie, and were infeft. D. M'Millan, as an individual, was rendered bankrupt 26th October 1812; and his estate having been sequestrated, the trustee raised reduction of Creightons security on the act 1696, c. 5.

Creightons defences were,—1. That the property belonged to D. M'Millan and *Son*; and as the pursuer was not trustee on that estate, he had no title to pursue: and, 2. That this was a conveyance, not by D. M'Millan as an individual, but by D. M'Millan and *Son*, to D. M'Millan and *Company*, or, what was the same thing, to Creightons, as creditors of D. M'Millan and *Company*. But the Lord Ordinary holding, that D. M'Millan, both as surviving partner of D. M'Millan and *Son*, and as heir of his father, acquired right to the property, and that it had never been



legally transferred to D. McMillan and *Company*, concerned in the reduction, and the Court adhered.

D. FISHER—W. & A. G. ELLIS, W. S.—Agents.

No. 175. J. BOYD, Trustee for ANDERSON'S CREDITORS, Pursuer.—*More.*

J. ANDERSON and Others, Defenders.—

Nov. 16, 1821. *Proof—Process.*—Anderson, who had possessed for several years certain heritable subjects, to which he had succeeded as heir of his father, granted a disposition of part of them to his brothers and sisters, on the narrative that his father had, at his death, left a trust-deed, by which he had made special provisions to them out of the property, but which deed was now destroyed. On this disposition his brothers and sisters obtained infeftment. Anderson soon thereafter became bankrupt; and the trustee on his sequestrated estate raised an action of reduction of the above deed on the act 1621, c. 18. In defence, the brothers and sisters pleaded, that Anderson was under an obligation to grant the deed, as he himself had destroyed his father's settlement; and prayed for the judicial examination of the bankrupt and his mother, and a diligence against havers. The Lord Ordinary found, 'that the merits of the case, 'depend on the question, whether the bankrupt, 'Anderson, was under any obligation to grant the 'deed under reduction? That this depends upon the 'fact, whether the deed executed by his father was 'in existence at his father's death, and whether at 'that period it had been concealed or put out of the 'way: that before it is necessary to raise an action

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‘ of proving the tenor, or any other expensive proceedings, it is right to ascertain whether or not that deed is still in existence, and whether it existed after the father’s death ; and that this fact ought to be ascertained by a diligence.’ His Lordship, therefore, granted a diligence, for the recovery of the deed and other writings, against havers, who, he afterwards explained, were to be examined in terms of the act of sederunt 22d February 1688. Against this interlocutor the trustee presented a petition, on the ground, that an examination of havers was incompetent in order to inquire into the history and existence of the deed. But the Court refused the petition.

W. & A. G. ELLIS, W. S.—

—Agents.

W. DIXON, Pursuer.—*Forsyth—Jeffrey—Cockburn.* No. 176.  
 MONKLAND CANAL COMPANY, Defenders.—*Clerk—Jardine.*

*Process.*—The question here was, Whether the Canal Company were entitled, under a particular statute, to levy increased canal-dues before executing certain improvements? Nov. 16, 1821.  
 SECOND DIVISION.  
 Lord Reston.  
 B.

The Lord Ordinary, by a final judgment, found, that the company are, in the first instance, entitled to levy the duties asked by them ; but that, in consequence of doing so, the pursuer is entitled to reasonable implement of these improvements. Thereafter the Court appointed an engineer to report whether these improvements had been executed. After he had made two reports, that the

canal was completed in terms of the statute, Dixon offered a proof by witnesses, to shew, contrary to these reports, that the canal was not yet navigable; as required, by the act. But the Court considered this offer too late; and the more especially, as no objection had been made to the appointment of the engineer. They, therefore, assoilzied the Canal Company.

D. FISHER—WM. PATRICK, W. S.—Agents.

No. 177.

A. M'KENZIE, Pursuer.—*Matheson*.

J. LYON, Defender.—*Jeffrey—Forbes*.

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Lord Pitmilley.

F.

*Process—Expences.*—M'Kenzie having been charged by Henderson on a bill for the price of herrings, suspended, on the ground that they were unmarketable; and that Lyon (Henderson's agent, by whom they had been sold) had agreed to rescind the bargain. The Lord Ordinary repelled the reasons; but this judgment was kept open by a petition. In the meanwhile, M'Kenzie raised an action of relief against Lyon, (the agent), from which the Lord Ordinary assoilzied him. This case having also been carried into the Inner House, the Court recalled the interlocutors in both cases, and remitted to the Lord Ordinary either to conjoin them, or to sist the action of relief until the issue of the principal cause; but nothing was said as to expences. It was sisted; and the Lord Ordinary having thereafter suspended the charge in the principal case, M'Kenzie demanded the expences in the action of relief. Lyon resisted this,—1. Because the action against him was unnecessary; and, 2. Because it was incompetent to

award expences, in respect there was no reservation of them in the remit. The Lord Ordinary refused expences on the latter ground; but the Court altered this judgment, and found M'Kenzie entitled to them.

J. Gairn, W. S.—J. Russell, W. S.—Agents.

J. HUTCHISON, Petitioner.—Clerk—J. Wilson, jun.

No. 178.

J. LIDDLE, Respondent.—T. H. Miller.

*Trustee—Expences—Process.*—This was a claim for expences by Hutchison, in a competition between him, Liddle, and M'Dowall, for the office of trustee on a sequestrated estate, (see No. 80). By an interlocutor of 9th March 1821, no expences were allowed to any of the competitors; and a petition on this point by Hutchison was refused, on the 15th May, but appointed to be answered on the merits. He was ultimately confirmed trustee; and he then asked the expences of the discussion. But the Court held, that the question of the prior expences was finally closed by the interlocutor of 15th May: that as to those subsequently incurred, they ought not to be given in the circumstances of the case; and found him personally liable in the expences of this new discussion.

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DAVID SCOTT, W. S.—JOS. LIDDLE,—Agents.

No. 179. J. CUNINGHAME, Petitioner.—*Moncreiff—R. Bell.*  
J. and G. DICKSON, Respondents.—*Bell.*

Nov. 17, 1821. *Bankrupt—Discharge.*—This was an application  
FIRST DIVISION for a discharge under the bankrupt-statute, supported  
H. by the certificate of the trustee of the requisite concurrence. But the Court being satisfied that the bankrupt had been guilty of fraud and collusion, refused to grant the discharge.

D. GREGG, W. S.—J. STUART, W. S.—Agents.

No. 180. ANN NICOLL, Pursuer.—*P. Robertson—J. Henderson, jun.*  
A. ROBERTSON, Defender,—*Jeffrey—H. Lumsden.*

Nov. 17, 1821. The late Alexander Robertson had two natural  
FIRST DIVISION daughters by the pursuer, Ann Nicoll. After his death  
Lord Gillies. she raised an action against his son, the defender, the  
D. representative of his father, for a certain sum of aliment, bygone and to come, for a limited period. The defence was,—that the bygone aliment had been paid by Alexander Robertson; and that an agreement had been entered into between him and the pursuer's father to support the children, in consideration of a certain sum, which had also been paid. The Lord Ordinary, finding these facts proved, assoilzied the defender; and the Court adhered.

T. LAWSON—A. YOUNGSON W. S.—Agents.

W. SANDERSON, (WALKER'S TRUSTEE.)—*More*—J. No 181.  
*Wilson, jun.*

J. STARK.—*Alison.*

CARNIE and Co.—*Moncreiff*—*Brownlee.*

*Fraud.*—This was a very special case. Stark had Nov. 17, 1821.  
 been engaged in trade with Walker, under the firm SECOND DIVISION.  
 of Walker and Stark. At the dissolution of this com- Lord Meadow-  
 pany, Walker entered into partnership with Carnie bank.  
 and Company, under the name of Carnie Walker Car- F.  
 nie and Company, and conveyed to that company the  
 whole free stock of Walker and Stark. Carnie  
 Walker Carnie and Company granted, inter alia, to  
 Stark, in payment of his share of the stock of  
 Walker and Stark, an obligation for £500. By cir-  
 cumvention, Walker thereafter prevailed on Stark  
 to convey to him this obligation, and to accept in  
 place of it his bills. Walker becoming bankrupt,  
 Stark claimed to be ranked on his estate for the  
 bills, in the event that his transference of the obli-  
 gation should be found binding. The trustee ap-  
 plied to the Court to have both this claim and one  
 by Carnie and Company, as in right of Carnie Walk-  
 er Carnie and Company against Walker, summarily  
 discussed. The Court held, that the obligation in fa-  
 vour of Stark by Carnie Walker Carnie and Com-  
 pany was still effectual; and, therefore, that he could  
 not also claim against Walker's estate for the value  
 of the bills; and remitted to the Lord Ordinary to  
 hear parties on the claim by Carnie and Company.

A. PATERSON—CAMPBELL & ARNOTT, W. S.—DONALDSON &  
 RAMSAY, W. S. Agents.

No. 182. **Duke of Gordon, Petitioner.**—*Moncreiff—P. Robertson—Lumsden.*

**J. INNES, Respondent.**—*Cranstoun—Skene.*

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B.

*Personal Objection—Homologation—Process.*—The Baroness of Mordaunt, as heir of entail, having obtained decree of reduction against Innes of a lease of the estate of Durris,\* he appealed to the House of Lords. Previous to the discussion of the appeal the Baroness died. The Duke of Gordon was the next substitute under the entail, and also the executor and residuary legatee of the Baroness. After being duly served and infeft under the entail, he prayed the House of Lords to sist him as respondent in the appeal. This was opposed, on the ground that there was a personal objection to his title to pursue, and that it was not competent to sist a party in the Court of Appeal. The House of Lords refused to sist the Duke; on which he applied to the Court of Session to admit him as a party; but, as there was no remit from the House of Lords, the Court (17th June 1820) found the application incompetent. Thereafter a remit was obtained, ‘without prejudice to the appeal,’ and with liberty to apply to the House of Lords, so soon as the Court of Session had made any order in the matter. Against sisting him, Innes rested on a personal objection, which was founded, —1. On acquiescence, in respect that the Duke had been aware of the existence of the lease for many years, and had allowed Innes to expend to the extent of £80,000 on the estate,

\* See Fac. Coll. Baroness of Mordaunt v. Innes, 9th March 1819.

without interruption.—2d, On homologation, by entering into a transaction, by which he purchased back from Innes the eventual interest of the Marquis of Huntly in the entailed estate, who had sold it to Innes, and who had in the deed of sale recognised the lease. But the Court held, 1. That as the Duke was a remote substitute, and had merely a contingent interest, he was not bound to raise a reduction of the lease, so as to interrupt the alleged expenditure on the estate, this being *res meræ facultatis*; and, 2. That the Duke was not only no party to the transaction with the Marquis of Huntly, but cancelled and annulled it, which could not infer homologation. The objection was, therefore, repelled, and the Duke sisted in room of the Baroness of Moradant.

J. S. ROBERTSON, W. S.—JOHN BOWIE, W. S.—T. INNES, W. S.  
—Agents.

MARGARET RIDDEL L and Others, Pursuers.—*Bell*.  
D. CHRISTIE, Defender.—*Moncreiff*—*Blackwell*.

No. 183.

*Jurisdiction—Bankrupt—Pactum Illicitum*.—Riddell having been sequestrated under the bankrupt-statute, Christie, a creditor, was ranked on his estate, and was chosen a commissioner. After an offer of composition had been rejected by the creditors, Christie obtained from the bankrupt, his wife, son, and daughter, various bills for part of his debt, and a promise from the bankrupt to pay the balance. This transaction was said to have been entered into, as an inducement to Christie to procure the bankrupt's discharge. The wife, with consent of her husband, and the child-

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ren, afterwards raised an ordinary action before the magistrates of Glasgow, concluding against Christie for restitution of the bills, or the amount thereof, on the ground that they had been fraudulently and illegally obtained. The bills were then in possession of Christie. He declined the jurisdiction of the Court, on the plea that this was substantially an action of reduction; and, on the merits, contended, that the transaction was a lawful sale of his debt to the bankrupt. The magistrates repelled the declinature; and, on the merits, found that the transaction, which was  
' an obligation by a creditor to convey a debt due  
' by the bankrupt to that bankrupt, after the sequestration of his estate, in consideration of bills for  
' the greater part of the debt being granted by the bankrupt's wife and children, and of a promise by the  
' bankrupt to pay the residue, cannot be held as a  
' bona fide sale of his debt by a creditor,' but was a pactum illicitum; and, therefore, decerned against Christie. In an advocacy, the Lord Ordinary, 'i  
' respect the conclusions of the libel in the process  
' before the magistrates of Glasgow are, that the  
' advocator should be ordained to deliver up the bill  
' in question, or the amount thereof, and that the  
' bills were in the possession of the advocator at the  
' time of bringing the action, and continued so for  
' some time thereafter, repels the objection stated  
' the competency of the action, and, upon the merits  
' repels the reasons of advocacy, and decerns.' To this interlocutor the Court adhered.

JOHN MOWBRAY, W. S.—T. MEGGET, W. S.—Agents.

J. WILKIE, Complainer.—*Clerk—Murray—Black-* No. 184.  
*well—Walker.*

J. SMITH, Respondent.—*Cranstoun—Cockburn—*  
*Hope.*

*Freehold Qualification—Member of Parliament.*— Nov. 20, 1821.

In 1771, Wilkie was entered on the roll of freeholders of the county of Haddington, as heir-apparent to his father, who, at his death, stood publicly infeft and in possession of ‘all and whole the lands of Gilchriston, mill and mill-lands,’ and others, which are retoured a £3 : 6 : 8 land of old extent. Wilkie was thereafter infeft on a charter of resignation from the crown, and was thus possessed of the plenum dominium. By a disposition granted in 1814, he sold to General Campbell’s trustees ‘all and whole the lands of Gilchriston,’ &c. but ‘reserving always to myself the superiority or dominium directum of the whole foresaid lands and others hereby disposed during all the days of my life.’ The deed contained an obligation to infeft by two several manners of holding, with a procuratory of resignation, (in which the above reservation was repeated, but no restriction was laid on the trustees against executing it), and a precept of sasine, on which the trustees were base infeft.

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At an election in 1820, the freeholders expunged Wilkie’s name from the roll, and refused to inrol him, on restricting his qualification to the reserved liferent-right of the superiority. Their objections to his restricted claim were,—1. That there was no superiority constituted as a distinct estate which could be the subject of reservation; and, at all

events, as the plenum dominium was conveyed to the trustees, the dominium directum was not reserved. 2. That even although such a separate estate had been created or reserved, the right was not sufficiently absolute, but was defeasible by the trustees, who might at any time lawfully execute the procuratory of resignation. Against the judgment of the freeholders Wilkie presented a petition and complaint, in which he alleged, 1. That, in virtue of the reservation, he still continued infeft in the dominium directum; and that a proper vassalage was constituted by the base infeftment of the trustees; and, 2. That the trustees could not lawfully execute the procuratory during his life, so as to deprive him of his reserved right of superiority. After a hearing in presence, and a petition and answers, the Court, by a majority, dismissed the complaint.

This case was considered to be distinguished from those at p. 111 of Bell on Election Law, by the trustees being under no obligation to refrain from executing the procuratory.

W. BELL, W. S.—J. SMITH, W. S.—Agents.

No. 185. Mrs. ROSE and HUSBAND, Pursuers.—*Jeffrey—More.*

W. ROSE, Defender.—*Cockburn—Rutherford.*

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*Minority—Homologation.*—This was a reduction, on the head of minority and lesion, of a bond for £800, granted by Catherine Rose, (the pursuer), with consent of her father, to the defender, her brother. The alleged inductive cause of the bond was remuneration of personal trouble and expence incurred

by the defender in relation to an action of damages at the pursuer's instance, under which she obtained decree for £900. A few days after the bond was granted, she entered into a contract of marriage with Cumming, in which she 'binds and obliges herself to make payment to him of the sum of £600 of principal, which with the £300 lately conveyed with consent of her father to William Rose, her brother, for the various causes stated in the bond granted for the said £300, making together £900 sterling, is the principal sum due and addebtied by John Gollan,' &c. The defences against the action were,—1. No lesion, the full amount of the bond being due for trouble and outlay in the lawsuit, whereby the pursuer had recovered £900. 2. That the bond was homologated by the terms of the above contract of marriage. The Lord Ordinary repelled the defences, and decerned in the reduction, 'reserving to the defender to recover from the pursuers any account of expences which he may have incurred on their account, and to them their defences, as accords.'

In a note the Lord Ordinary observed,—'The circumstances stated as to homologation do not apply to the minor herself, but to her husband. At the time he entered into the contract of marriage, it might be doubted whether he had any title to challenge the bond; and there is no evidence offered of any homologation after the marriage.'

THOS. SMALL, W. S.—ÆNEAS M'BEAN, W. S.—Agents.

No. 186. R. SPEIRS, (WALKER'S Trustee), Complainer.—*Blackwell.*

J. WALKER, Respondent.—

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F.

*Bankrupt.*—Decree (in absence) ordaining Walker, a bankrupt, to be imprisoned until he should grant a disposition and assignation of his property, in terms of 54. Geo. III. c. 139, § 29.

JAS. DUNLOP, W. S.—

—Agents.

No. 187.

P. BRYSON, Pursuer.—*Forsyth—Sandford.*

MAGISTRATES OF GLASGOW, Defenders.—*Sir J. Connell.*

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Lord Pitmilly.

B.

*Public Police—Riot Act.*—Bryson raised action against the magistrates of Glasgow, as representing the community, on the riot acts 1. Geo. I, c. 5, and on the 57. Geo. III, c. 19, for reparation of damages done to his shop by a mob. The magistrates admitted that he was entitled to reimbursement; but maintained, that the statutes import that damages sustained in burghs shall be paid, not by the magistrates themselves, nor even out of the funds of the burgh, but by assessment on the inhabitants; and, therefore, that decree could not go out against them till the inhabitants had been assessed. The Lord Ordinary reported the case; and the Court, by a majority, found, 'that damages are due by the magistrates and town-council of Glasgow, as representing the community of the royalty of Glasgow; reserving to the magistrates and town-council their relief against the said community for recovery of these damages, and all consequent expences, as accords of law.'

Pleaded, but not decided, whether *cash* falls under the words ‘furniture, goods, and commodities whatever,’ in the 57. Geo. III, c. 19.

The magistrates rested chiefly on Mylne against the county of Perth, 17th February 1775, (M. 13180); but it was considered not applicable to the case of a burgh.

D. FISHER—W. DICKSON, W. S.—Agents.

The TRUSTEES of the late EARL OF ABERDEEN, and  
W. GORDON, Pursuers.—*M’Kenzie*.  
The Right Hon. W. DUNDAS, and W. H. NISBET,  
Defenders.—*Bell—Boswell*. No. 188

*Prescription—Warrandice.*—By disposition dated 27th February 1729, John Lord Belhaven sold to William Earl of Aberdeen certain lands, with the teinds, binding himself ‘to warrant the said parsonage-teinds from all future augmentations imposed, or to be imposed upon the said parsonage-teinds, except the stipends then payable to the ministers of Prestonhaugh and Athelstaneford.’ In 1817, an action was raised by the trustees of the late Earl of Aberdeen against Mr. Dundas and Mr. Nisbet, as representing John Lord Belhaven, for relief of payments made to the ministers of the above parishes, in consequence of subsequent decrees of augmentation. The decree of augmentation of Prestonhaugh was dated in 1793, and the locality in 1811. Relief was claimed of payments from 1791. The decree of augmentation of Athelstaneford was dated in 1770, and the locality in 1781. At first the payments were said to have commenced in 1767, but this was

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afterwards corrected to 1779; and relief was claimed from 1781. Various defences were made; and particularly it was contended, that the obligation of warrandice was prescribed, by payments having been made, without asking relief, from 1767; but the only evidence adduced of this allegation was the above statement of the pursuers, which had been retracted. The Lord Ordinary repelled the plea of prescription; and the Court adhered.

J. MORRISON, W. S.—A. WISHART, W. S.—J. HOME, W. S.—  
Agents.

No. 189. D. G. FORBES of Culloden, and his TRUSTEES, Pursuers.—*Cranstoun—Buchanan.*  
Dr. G. FORBES, Defender.—*P. Robertson.*

Nov. 22, 1821. This was an action of count and reckoning against  
FIRST DIVISION. Dr. Forbes to account for his intromissions as factor  
Lord Alloway. on the estate of Culloden from 1810. The case was  
H. decided chiefly in terms of the report of an accountant, but reserving to Dr. Forbes to constitute any of his unvouched counter-claims by the oath of the pursuer, and also an alleged claim of damages. The only general point respected the competency of opening up an alleged settlement in 1813 of his accounts: but the Lord Ordinary and the Court being satisfied that it was a mere sketch or memorandum for a temporary purpose, allowed an investigation beyond its date.

M'QUEEN & M'INTOSH, W. S.—JAS. S. ROBERTSON, W. S.—  
Agents.

**Æ. SMITH, Suspenders.—***Skene.*  
**C. and M. OGILVIE, Chargers.—***Bell.*

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Lord Gilkie.

H.

*Cautioner—Qualified Discharge.*—In 1798, J. Innes and Æ. Smith granted a bond to Miss Ogilvies, in which they ‘bind and oblige us, conjunctly and severally, and our heirs,’ &c. to content and pay to them £1,000. Although ex facie of the bond Smith was a joint obligant, yet it was admitted that he was cautioner. Innes becoming insolvent, a contract of composition was entered into with his creditors. The Miss Ogilvies acceded to the contract, but under this special qualification,—‘Reserving recourse against Mr. Smith, cautioner.’ In 1818, a charge of payment was given to Smith, who suspended, on the ground,—1. That the bond was prescribed by the act 1695; and, 2. That all claim against him was discharged by the creditors having, without his consent, acceded to the composition-contract, and by accepting the composition.

The Lord Ordinary at first sustained the reasons of suspension, but afterwards granted a diligence, before answer, for the recovery of correspondence, to shew that Smith consented to, or was in the knowledge of the accession to the composition-contract. After the diligence had been executed, he reported the case to the Court, who disregarding the plea on the act 1695, and laying aside any inquiry as to Smith’s consent or knowledge, repelled the reasons of suspension, ‘in respect the discharge of the debts in question, granted to Mr. Innes by the chargers, appears to be of a qualified and conditional nature, that the same shall not be effectual to Mr. Innes,



‘ in case the cautioner shall be liberated thereby.’  
And to this judgment they afterwards adhered.

J. B. FRASER—RO. STEWART,—Agents.

No. 191. M. M'GREGOR, Petitioner.—*Cranstoun—J. Miller,*  
*jun.*

Mrs. M. B. M'NIELL and HUSBAND, Respondents.—  
*Moncreiff—Rutherford.*

Nov. 22, 1821. *Sequestration of Land Estate.*—Mary B. M'Niell  
FIRST DIVISION. was proprietor of certain heritable property. In  
S, 1816, she married R. Jolly, and they were in full  
possession of the estate. M'Gregor raised a declarator of marriage against her, which he alleged had taken place prior to that with Jolly; and he obtained a judgment to that effect before the Commissaries. He thereupon, and before the case was final, presented an application to the Court of Session for sequestration of her whole estate, heritable and moveable, pending the declarator of marriage, and to name a judicial factor. But the Court refused his application, and found him liable in expences.

JOHN MEEK, W. S.—JAS. SMITH, W. S.—Agents.

No. 192. Misses GILLESPIE, Suspenders.—*Forsyth.*  
J. K. CLARK, Charger.—*Clerk.*

Nov. 22, 1821. *Tack—Minor.*—Misses Gillespie, (minors), with  
SECOND DIVISION. consent of their father, Colin Gillespie, entered into a  
Bill-Chamber. tack (29th August 1821) with ‘the said Colin Gillespie  
Lord Meadowbank. and John King Clark, copartners, under the firm of  
B. ‘the Woodside Weaving Company,’ by which they let

four flats of a house ' to and in favour of the said  
 ' Colin Gillespie and John King Clark, and the sur-  
 ' vivor of them, and the heirs of the survivor, for be-  
 ' hoof of the said copartnership, and their subtenants,  
 ' they always continuing, jointly and severally, liable,  
 ' with their subtenants, for payment of the rents, and  
 ' performance of the obligations after specified, but  
 ' expressly excluding assignees, legal or convention-  
 ' al.' Although the entry was not to be till Martin-  
 mas 1821, the company got possession before that  
 time. On the 10th November 1821, Gillespie be-  
 came bankrupt. The Misses Gillespie then pre-  
 sented a bill of suspension and interdict against  
 Gillespie and Clark, as individuals, or either of them,  
 from taking possession, in respect,—1. That the  
 company was now dissolved; and, 2. That the lease  
 was null, as it had been taken by an administrator-  
 in-law in his own favour. The Lord Ordinary re-  
 fused the bill; but while the Court passed the bill of  
 suspension, to try the question, they refused the in-  
 terdict.

W. & A. G. ELLIS, W. S.—GIBSON, CHRISTIE, & WARDLAW,  
 W. S.—Agents.

G. MUNRO, Pursuer.—*Forsyth.*

J. JERVEY, Defender.—*M<sup>r</sup> Farlane.*

No. 193.

*Servitude—Acquiescence.*—Munro, in 1815, bought  
 the first flat immediately above the shop-storey of a  
 tenement in Glasgow, as then and formerly possess-  
 ed. Jervay was proprietor of the shop-storey, from  
 one of the rooms of which the chimney was carried  
 in a horizontal line under Munro's windows, and then  
 perpendicularly to the roof. At the angle thus form-

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H.

ed there was a moveable stone, which filled up an aperture made for the purpose of allowing the horizontal part of the chimney to be swept. It was alleged by Jervey, that this aperture had existed since 1774 ; and it was admitted by Munro, that from 1781 it had never been challenged by his authors. In 1819, he raised a declarator of immunity from this servitude, on the ground, that he was the unqualified proprietor of the wall ; and that Jervey had no written or prescriptive title to this servitude. But the Lord Ordinary and the Court sustained the defence of acquiescence proposed by Jervey.

D. BROWN, W. S.—TODD & WRIGHT, W. S.—Agents.

No. 194.

J. COOPER, Pursuer.—*Gordon.*

D. LAIRD, Defender.—*Hope.*

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S.

Cooper pursued Laird for payment of the price of goods. The defence was, that the goods were not purchased from Cooper, but from a mercantile company of which he was foreman. The whole question turned upon this allegation, which the Lord Ordinary and the Court finding established, assoilzied Laird.

A. STORRIE, W. S.—D. M'LEAN, W. S.—Agents.

No. 195. J. D. and C. M'LACHLANS, Suspenders.—

J. CAMPBELL, Charger.—*P. Robertson.*

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Bill-Chamber.

Lord Craigie.

F.

*Bill of Exchange.*—This was a suspension of a charge on renewed bills accepted by a person in prison in order to obtain his liberation, and which were made to include the expence of diligence on the ori-

ginal bills. The Lord Ordinary, ' in respect it appears that the bills charged on contain not only the principal sum and interest admitted to be due to the charger, but also contain sums said to be due for the expenses of diligence incurred for re-covering the debt, which do not appear to have been properly liquidated, passes the bill without caution or consignation.' The Court refused a petition against this judgment.

D. CAMERON, W. S.—D. M'LEAN, W. S.—Agents.

J. GLASS, Pursuer.—*More.*  
J. WEIR, Defender.—*Gillies.*

No. 196.

*Funeral-Expences.*—Glass raised action against Weir, as executor, and Mrs. Weir, as widow of Andrew Weir, for repayment of certain sums advanced by him under her sanction for the funeral-expences. Decree in absence was pronounced against the widow. The deceased had been the guard of a coach, and left about £300. He died at Perth, where he was buried. And the question was, Whether some of the articles charged for the funeral-expences were extravagant? In relation to these the inferior court found, that ' the article of £2 : 17s. for wine, and the one of £5 : 5 : 6 for spirits, during a period of four days, are most extravagant; and, in the circumstances of the case, only admissible to the amount of £3 against Weir: that the sum of £5 : 7 : 6 for a coffin alone, is extravagant and inadmissible for a person in the situation of the defunct; and that the same can only be sustained against Weir to the amount of £4; and find him not liable for

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B.

‘ the account for mournings to the widow.’ In an advocacy, the Lord Ordinary decerned, in terms of the libel, against Weir; and the Court adhered, ‘ re-  
 ‘ serving relief against the widow, the respondent, if  
 ‘ required, granting an assignation to the sums re-  
 ‘ ceived, at the expence of the petitioner.’

W. & A. G. ELLIS, W. S.—N. W. ROBERTSON,—Agents.

No. 197. J. DINWIDDIE and Others, Pursuers.—*Clerk—Jameson.*

J. CORRIE and Others, Defenders.—*Moncreiff—T. H. Miller.*

Nov. 23, 1821. *Servitude—Clause.*—The barony of Duncow, be-  
 longing to one proprietor, was sold in seventeen lots.  
 SECOND DIVISION. One, containing Duncow Common, where the tenants  
 Lord Pitmilley, of the barony used to cast peats, was sold to Dinwid-  
 M’K. die and others, ‘ reserving to the tenants of the  
 ‘ whole barony the right of casting, winning, and  
 ‘ leading peats within Duncow Common, conform to  
 ‘ use and wont.’ On the expiration of the existing  
 leases, Dinwiddie, &c. raised a declarator, to have it  
 found, inter alia, that this servitude was personal to  
 the then tenants of the barony. The Lord Ordinary,  
 after finding that the tenants of the barony had enjoy-  
 ed the right of casting peats by use and wont, and that  
 the reservation ‘ would not have been so expressed,  
 ‘ if it had been intended to limit the privilege to the  
 ‘ then tenants of the barony; but that these words  
 ‘ infer that the tenants of the whole barony were,  
 ‘ according to the former usage in times past, to  
 ‘ continue to enjoy this privilege;’ assoilzied the de-  
 fenders. To this judgment the Court adhered, in so

far as it contained precise findings, but in hoc statu recalled the general absolvitor, and remitted to hear parties on certain other points of the cause.

J. THORBURN—A. BLAIR, W. S.—Agents.

D. NAPIER, Suspender.—*More.*

No. 198

MAGISTRATES of GLASGOW, Chargers.—*Jeffrey—  
Jardine.*

*Statutes 82. Geo. II, c. 62, and 10. Geo. III, c. 104*  
—*Jurisdiction.*—By these statutes the magistrates of Glasgow are empowered to levy ‘one penny sterling per ton for all ships, barges, vessels, lighters, and boats, which shall be brought to the quays aforesaid, viz. the Bromielaw quay, and another projected quay on the south bank of the river, or either of them, or within the bounds and limits of such parts of the river Clyde as the former rates, &c. were in use to be collected,’ &c.

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Lord Craigie,  
F.

Under these statutes the magistrates raised an action against the proprietors of the Post-Boy steamboat before the water-bailie of Clyde for the quay-dues of each trip between Glasgow, Dumbarton, and Greenock.

The defences were,—

1. A declinature of the jurisdiction, as the water-bailie was one of the magistrates, and, consequently, one of the pursuers; and the process was advised by the assessor of the magistrates, who was also assessor of the water-bailie.

2. That the statutes refer to vessels carrying goods; whereas the Post-Boy carries only passengers and their luggage: And,

3. That the statutes did not mean that the dues should be exigible for each voyage, if more than one was made in the day.

The water-bailie having decerned in terms of the libel, the proprietors presented a bill of suspension, which the Lord Ordinary refused; and the Court adhered.

C. FISHER—W. DICKSON, W. S.—Agents.

No. 199.

C. GIRDWOOD and Co., Petitioners.—*Skene*.  
W. JEFFREY and Others, Respondents.—*Cranston*—*Jameson*.

Nov. 24, 1821.

SECOND DIVISION.  
B.

*Bankrupt—Sequestration—Expences.*—Girdwood and Company having been assoilzied from an action of reduction of a decree-arbitral raised by the trustee of Fleming, (in which Fleming was one of the submitters), on the ground that it was null, as having been pronounced after Fleming's bankruptcy and sequestration; and having been found entitled to expences,\* the trustee charged them against the estate at large. But Girdwood and Company (who formed a majority in value) moved, at a meeting of the creditors, 'that these items should be struck out of the trustee's accounts, reserving to him to operate his relief from the minority, under whose instructions he had thought fit to act; and that the trustee should be instructed forthwith to divide the free balance which shall appear to be in his hands, on making up his accounts, on the above principle.' The opposing creditors moved, that the funds should

\* See *Grant v. Girdwood and Company*, 23d June 1820, Fac. Coll.

be divided, after 'charging the whole expenses incurred in the litigation before referred to against the general body of the creditors without distinction.' Each party having protested that they had the majority, Girdwood and Company complained to the Court; who found, 'that no part of the expenses incurred on either side in the litigation alluded to fall to be charged against, or to affect the fund of division among the creditors of Robert Fleming, in so far as the petitioners are concerned.'

W. BALLANTINE, W. S.—GIBSON & OLIPHANT, W. S.—Agents.

A. HEWIT and G. NAPIER, Suspenders.—*L'Any—* No. 200.  
*Ro. Bell.*

W. POLLOCK, Charger.—*Gillies.*

*Process—Reference to Oath.*—The Lord Ordinary in the Bill-Chamber having per incuriam supposed that Hewit and Napier had made a reference to the oath of Pollock, as to the due negotiation of a bill of exchange, appointed him to depone. The deposition was taken in presence of Hewit and Napier, who put questions. On the oath (which was unfavourable) being reported, they gave in a note, alleging that no reference had been made. The Lord Ordinary refused the bill, in respect 'no objection was made until several weeks after the oath had been taken; that the suspenders are proved and admitted to have been present at the charger's deposition, but did not state on that occasion that they made no reference to the charger's oath, and took no measures on that, or any other time, to correct the mistake; and

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Lord Pannily.

B.



‘ to prevent the deposition from being emitted.’ But the Court passed the bill, to inquire into certain alleged irregularities in taking the oath. Thereafter, being satisfied that every thing was correct, they adhered to the Lord Ordinary’s interlocutor, finding the letters orderly proceeded.

It was observed that the error might have been corrected by a note to the Lord Ordinary on the Bills, or by a protest at taking the oath.

F. SNODGRASS, W. S.—W. GUTHRIE—WELSH & EWART, W. S.  
—Agents.

**No. 201.** PEACOCK and Others, Assignees of BEATTIE, Pursuers.—*Cranstoun—More—Ro. Thomson.*  
A. GLEN, Defender.—*Clerk—Moncreiff—Buchanan.*

Nov. 24, 1821. *Process.*—This was an action of reduction of a bond and disposition and infestment granted by Beattie in favour of Glen, raised by the assignees of Beattie under a commission of bankruptcy, on the head of fraud. In the pleadings, however, before the Lord Ordinary, the parties argued the case on the ground that Glen’s title was null, as flowing a non habente potestatem; and the Lord Ordinary having sustained this plea, reduced the conveyance. Against this judgment a petition was presented, and answers were lodged, in both of which the parties argued the case as before the Lord Ordinary. But it having been observed at the advising, that the interlocutor was not applicable to the summons, the Court, in respect thereof, altered it; found neither party entitled to expences, and remitted to the Lord

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Lord Pitmilley.

F.

Ordinary to hear parties farther on the other points of the cause.

J. MOWBRAY, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.—  
Agents.

D. RITCHIE, Pursuer.—*Buchanan*.  
G. WYLLIE, Defender.—*J. Henderson, jun.*

No. 202.

*Bankrupt—Reduction on 1696, c. 5.*—Lawson indorsed to Wyllie a bill for £100 accepted by Fullertons. Before it fell due Fullertons became bankrupt, and being unable to pay the bill, they drew one on Watson, their debtor, for the amount, in favour of Wyllie, which was accepted and paid. The estates of Fullertons having been sequestrated, the trustee raised an action of reduction and repetition of the last bill on the act 1696, c. 5. The defence by Wyllie was,—  
1. Value given, in respect the first bill had been delivered up in consideration of the second; and that a quantity of yarn, over which he had a lien, had been given up on faith of this bill. 2. That if the bill were reduced, he was entitled to have the yarn restored to him: And, 3. That he had right to a certain composition on his debt, for which he ought to get credit. The Lord Ordinary and the Court decerned in terms of the libel, under deduction of the amount of the composition.

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H.

G. HOGARTH, W. S.—THOMSON & FLEMING, W. S.—Agents.

J. ALGIE and Others, Petitioners.—*Burn—Murdoch*.

No. 203.

*Bankrupt—Sequestration.*—Decree, (in absence), recalling the sequestration of Robert Blair, in respect

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H.

that he did not fall under the class of persons included in the bankrupt statute, being a farmer, and not a trader in grain.

JAS. STUART, W. S.—Agent.

No. 204. J. DUNSMORE and Others, Suspenders.—*Rose Robinson.*

J. OSWALD, Charger.—

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S.

*Tack—Periculum.*—Dunsmore and others obtained a lease of part of the salmon-fishing on the river Clyde; and in the articles of roup there was a clause, that 'power is reserved for improvement to be made on the river, without any claim of damages on the part of the tacksmen.' This was inserted in reference to the 82. Geo. II, empowering commissioners to improve the navigation. The tacksmen having granted their bill for the rent, presented a bill of suspension of a charge, on the ground, that, by the operations of the commissioners, the fishing had been rendered quite unproductive. The Lord Ordinary and the Court refused the bill.

Observed on the Bench, that this case was different from Foster and Duncan against Adamson and Williamson, 16th July 1702, quoted by the suspenders, (M. 10131).

DAVID BRASH—WM. RENNY, W. S.—Agents.

No. 205. Misses CREE, Advocators.—*Jeffrey—Marshall.*  
J. COLLIER, Respondent.—*Clerk—Greenshields.*

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Lord Pitmilley.  
M'K.

*Reparation.*—An action of removing was raised by Misses Cree against Collier, their tenant, on the al-

legation that ' he possessed the lands, and without a  
' tack, and has failed to implement the condition on  
' which a tack was once intended to have been grant-  
' ed to him.' In fact, Collier had possessed on a mis-  
sive for six years : but a short time before the action  
was instituted, he had intrusted it to the factor of  
Misses Cree. Having recovered it under an order  
of Court, he was assoilzied with expences. He then  
raised an action of damages against Misses Crees  
for the loss he had suffered, by being obliged to sus-  
pend his farming operations in consequence of the  
action of removing, and the false allegation there  
contained. The inferior court found damages due ;  
but in an advocacy the Lord Ordinary advocated  
the cause, and assoilzied the Misses Crees, in respect  
' the action of removing was evidently brought un-  
' der a mistake in point of law, which accounts for  
' the advocates not having at first produced or re-  
' ferred to the missive : that the defender had it in  
' his power to call for the missive ; and having done  
' so accordingly, it was produced, when the defender  
' (Collier) was very properly assoilzied from the re-  
' moving, and found entitled to expences : that the  
' defender was not prevented by the action of re-  
' moving, or by the terms of the summons, from cul-  
' tivating the farm as he chose : that even if he  
' was misled by the terms of the summons to believe,  
' as he now alleges, that the missive was to be sup-  
' pressed, he ought to have intimated his intention  
' of abstaining from sowing grass-seeds, and that  
' damages would be claimed : that the advocates  
' having been decerned to pay expences in the for-  
' mer action, paid the proper penalty of having rais-  
' ed and insisted in a groundless process ; and that

the additional claim, to be found entitled to damages, because they insisted in the previous process, 'is irrelevant and groundless.' To this judgment the Court (after being at the first advising equally divided) adhered. \*

The Judges in the minority held, that as the Misses Cree had been guilty at least of culpa in denying the existence of the missive-letter, they were bound to repair any loss thence arising.

W. Renny, W. S.—G. Veitch, W. S.—Agents.

No. 206.

H. SPENCE, Pursuer.—*Jameson.*

J. BAIKIE, Defender.—*Cranstoun—Forbes.*

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Lord Alloway.

H.

*Commonty.*—This was a question of fact, depending on the import of a long proof. Spence claimed a prescriptive right of commonty over a certain piece of land in Orkney; while Baikie alleged that it formed a pertinent of his estate, and was unburdened with any servitude. The Lord Ordinary and the Court

\* *Process.*—*Statute 1 and 2 Geo. IV, c. 38.*—Before proceeding to advise another case, (Donald and others v. Robertson, Reid, and others, not yet final), on which the Court was also equally divided, Clerk stated, that by 1. and 2. Geo. IV, c. 38, § 3, it was enacted, that where there is an equality of voices, the Lord Ordinary in the cause shall be called in to vote. At the first advising Lord Bannatyne was absent, but was now present, and prepared to give his opinion. The Court held that the statute was only applicable, where, at resuming consideration of the case, there was still an equality of voices; and that as Lord Bannatyne was ready to vote in the cause, the Lord Ordinary could not be called in. It was observed that it was still competent to the parties at this stage again to address the Court.

No papers on this point.

found that Baikie had proved that it was a pertinent of his property, and that Spence had not established his claim.

J. LAWSON, W. S.—M'KENZIE & MONYPENNY, W. S.—Agents.

J. C. MOORE, Petitioner.—*Clerk.*

No. 207.

*Process—Tailzie.*—The late Mr. Carrick entailed the lands and barony of Corsewall in favour of the petitioner; but before his death he sold Dunlop hill, which formed part of them. The petitioner prayed for warrant to record the entail, 'and to authorize the keeper of said record to leave out of the record the description of the said lands of Dunlop hill, as they do not belong to the petitioner.' The Court granted the first part of the prayer, but refused the last as incompetent.

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F.

RO. RUTHERFORD,—Agent.

G. VEITCH, Suspender.—*Menzies.*

No. 208.

J. CAMPBELL and Co., Chargers.—*Jameson.*

*Bill of Exchange—Decree of Cessio.*—Veitch granted a promissory-note to John Reston, which fell due on 12th June 1820; and on the 20th he received a charge of horning on it by J. Campbell and Company, as indorsees. Prior to this Veitch had raised a summons of cessio, which was executed against Reston on the 25th May, and called in Court on the 2d June 1820; but he did not get decree till 3d March 1821. He did not call Campbell and Company to that process; and having thereafter received a new

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B.

charge of horning from them, he presented a bill of suspension on the ground of the decree of cessio; but the Lord Ordinary and the Court refused the bill.

J. CAMERON—C. FISHER,—Agents.

No. 209. J. BISSET, Suspender.—*Cranstoun—Jeffrey—Blackwell.*

THE ROYAL EXCHANGE ASSURANCE COMPANY.—*Clerk—Moncreiff—White.*

Nov. 29, 1821. *Insurance—Clause.*—James Bisset had insured with the Royal Exchange Assurance Company certain mills and machinery, which were destroyed by fire. By the policy, the insurers became bound to pay any  
 ‘ loss or damage in money, without any deduction,  
 ‘ immediately after the same shall be settled and adjusted; or the said corporation shall, at the end  
 ‘ and expiration of sixty days after notice thereof  
 ‘ shall be given, provide and supply the assured with  
 ‘ the like quantity of goods, of the same sort and kind,  
 ‘ and of equal value and goodness with those burnt or  
 ‘ damaged by fire, or expend in rebuilding or repairing any building damaged or destroyed by fire  
 ‘ the sum assured thereon, under the direction of  
 ‘ able and experienced workmen, if the loss or damage shall in their opinion amount thereto.’ The mills had been let to a tenant; and, on their destruction, Bisset raised a summons of declarator against the tenant and the Assurance Company, to have it found that the lease was at an end; and (on this being declared) that the Company are bound to pay the loss in money; but, in the event that it should

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 D.

be held that the lease is not terminated, that then the Company should be ordained to rebuild the premises. The Company, notwithstanding, proceeded to rebuild, and had carried on the operations for some time, when a bill of suspension and interdict was presented by Bisset against them. The Lord Ordinary, in respect of the summons of declarator, passed the bill to try the question, but refused the interdict; and the Court adhered.

FORSYTH & M'DOUGALL—GIBSON, CHRISTIE, & WARDLAW, W. S.  
—Agents.

R. M'NICOL, (STEVENSON'S Trustee), Pursuer.— No. 210.

*Forsyth.*

J. M'NIELL, Defender.—*Jameson.*

*Bill of Exchange—Prescription.*—In 1797, M'Niell obtained decree in absence against Stevenson, then a minor, and his curators, as heir of his father, inter alia, for a bill of £100, which had been due more than six years. Thereafter M'Niell purchased, at a judicial sale by the curators, an heritable property belonging to Stevenson, and retained out of the price the amount of the debts in the decree. Stevenson, having discharged his guardians, subsequently became bankrupt; and, in 1815, the trustee on his sequestrated estate raised an action of reduction of the decree in absence, and of repetition. The Lord Ordinary, after finding that the circumstance of M'Niell having deponed, in the process of ranking and sale, to the verity of his claim, was no bar to this action, and pronouncing, on certain other points of the case, a special judgment, which was

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acquiesced in, found, in relation to the bill, ' that it ' was long prescribed before M'Niell acquired right ' to it; and there is no evidence yet produced that ' the prescription was barred by the execution of ' poinding;' and in reference to a plea that the prescription was interrupted by the curators having inserted the bill to their debit in the account under which the price of the property had been settled, ' that the statement by the curators of the amount of Mr. M'Niell's claims could not bar them, ' or the present pursuers, from afterwards investigating any of the articles of that account.' The Court allowed a diligence to recover evidence of the execution of the poinding as a bar to prescription. But this having failed, they adhered.

D. BROWN, W. S.—CAMPBELL & CLASON, W. S.—Agents.

No. 211,

J. M'INTOSH, Advocate.—*Hope.*

J. M'DONALD, Respondent.—*Cuninghame.*

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H.

This was a special case, in which there was no general point. M'Donald had intrusted to M'Intosh, a messenger, an obligatory letter for a sum of money granted by certain of his debtors to him, in order to recover payment. An action was afterwards raised against M'Intosh, either to restore the letter or pay its contents. The defence was, that they had been accounted for: but this failed. The Court confirmed the judgment of the Lord Ordinary and of the sheriff, decerning for the value contained in the letter.

G. ROBERTSON, W. S.—CAMERON & SCOTT, W. S.—Agents.

HERITORS, &c. of ABBEY PARISH of PAISLEY, Advocators.—*Sir J. Connell—Cranston—Fullerton.*  
 W. RICHMOND and Others, Respondents.—*Moncreiff—Alison.*

No. 212.

*Jurisdiction—Poor.*—In 1819, a petition was presented to the heritors and kirk-session of the Abbey Parish of Paisley by 825 ‘able-bodied men,’ claiming relief as *poor*, ‘in respect of the urgency of their situation, arising from the stagnation of manufacturing employment.’ The heritors and kirk-session having met, refused the petition, on the ground, that such persons did not fall within the class of poor for which the law provided. An application was then made to the sheriff of Renfrewshire, ‘to ordain the heritors and kirk-session to allow what is needful for the sustentation of such of your petitioners as, upon due inquiry, shall be found to have an insufficiency to support them.’ The sheriff sustained his jurisdiction, and ordained the heritors and kirk-session to meet and assess themselves for the relief of these persons. But, in an advocacy, the Lord Ordinary, ‘in respect that, by the acts of parliament and royal proclamations regarding the poor, the determination of the two following questions,—1<sup>st</sup>, Whether claimants of parochial aid are of the description of persons that are entitled to such relief? and, 2<sup>dly</sup>, If they be of this description of persons, what shall be the amount of the assessment and relief? is vested in the heritors and kirk-session of the parish; and that no controul over the proceedings and determination of the heritors and kirk-session in these particulars is committed to sheriffs

Nov. 29, 1821.

SECOND DIVISION.

Lord Pitmilley.

M.K.

‘ or other inferior judicatories; and in respect the  
 ‘ powers committed to sheriffs to see the enactments  
 ‘ relative to the poor carried into effect, do not infer  
 ‘ a jurisdiction to interfere with the determinations  
 ‘ of heritors and kirk-sessions on either of the two  
 ‘ questions above referred to; advocates the cause,  
 ‘ and assolizies the advocators from the conclusions or  
 ‘ prayer to the sheriff; it being reserved to the peti-  
 ‘ tioners, if dissatisfied with the proceedings of the  
 ‘ heritors and kirk-session of their parish, to apply  
 ‘ by a competent action to the Supreme Civil  
 ‘ Court.’ To this judgment the Court (by a major-  
 ity) adhered.

Several of their Lordships indicated an opinion, that if the heritors and kirk-session had refused to meet and to take the petition into consideration, a complaint to the sheriff would have been competent to oblige them to do so; but the majority were agreed that he had no power to review their decision.

A. NAIRNE—C. J. F. ORR, W. S.—Agents,

No. 213.

T. CARSE, Suspender.—*Jas. Wilson.*

J. KELLY, Charger.—

Nov. 30, 1821.

FIRST DIVISION.  
 Lord Alloway.

*Jurisdiction—Burgh—Statute 20 Geo. II, c. 43.*—  
 Kelly got decree against Carse before the magistrates of South Leith for £17:0:7½. Carse suspended, on the ground, that the magistrates had no jurisdiction in actions of debt beyond 40s., as South Leith was a burgh of barony subject to the magistrates of Edinburgh, and, as such, fell under the 20. Geo. II, c. 43, § 17. The Lord Ordinary and the Court repelled the reasons of suspension.

W. JAMIESON, W. S.—

—Agents.

**M. CLARKE, Suspender.**—*Rutherford.*

**J. SHEPHERD, Charger.**—*Blackwell.*

No. 214.

*Bill of Exchange—Society.*—Chalmers being indebted to Allan, accepted a bill for the amount, which Allan indorsed to Shepherd. When this bill fell due, Chalmers was unable to retire it. Being a partner of Mathew Clarke and Company, he accepted a new bill in name of the company, which was drawn on him by Allan, who indorsed it to Shepherd, and the former bill was delivered up, Shepherd having charged Mathew Clarke (the partner of Chalmers) to pay the new bill; he presented a bill of suspension, on the ground, that Chalmers had fraudulently made use of the company firm to pay off a private debt of his own; and that Shepherd was aware of that fact. This he referred to Shepherd's oath, who deponed, 'That he got the bill charged on, along with a sum in cash, in payment and farther security of a former bill which he held; and which former bill was accepted not by Mathew Clarke and Company, but by Peter Chalmers, as an individual;' and admitted that he knew that both Allan and Chalmers were in bad circumstances; that they were present when the bill was indorsed to him, and represented Clarke as a person from whom he would be secure in getting payment. The Lord Ordinary refused the bill, which was offered on caution; but the Court passed it.

Nov. 30, 1821.

FIRST DIVISION.  
Bill-Chamber.  
Lord Balgray,  
H.

MACMILLAN & GRANT, W. S.—RO. BURN, W. S.—Agents.

**No. 215.** Miss KYLE and her TRUSTEES, Pursuers.—*Clerk—Rathenford.*

T. KYLE'S TRUSTEES,—*Cranstoun—Walker.*  
and

A. WHITE, Defenders.—*Forsyth—Murray.*

Nov. 30, 1821.

SECOND DIVISION.

Lord Pitmilley.

F.

*Title to pursue—Process.*—D. Kyle raised a reduction of a disposition granted by him to W. Kyle, and sasine thereon, on fraud, facility, and lesion. He died during the dependence, and after having conveyed the lands mortis causa to Miss Kyle. She sisted herself as pursuer; but her title was opposed by the defenders, on the ground, that she had no special assignation to the action. The Lord Ordinary dismissed the action, in respect, 'that although the pursuer might have raised an action of reduction at her own instance of the disposition granted by the late David Kyle to William Kyle, with the infestment following upon it, in her character of gratuitous disponee of David Kyle; yet she has no title as disponee, and without an assignation to the process, to insist on a wakening of the action of reduction;' and his Lordship also sustained certain other defences.

But the Court, as she had an assignation and disposition of the *lands* in question, 'alter the interlocutors complained of, in so far as they dismiss the action on account of the petitioner (Miss Kyle) not having a special assignation to the process raised by David Kyle; recal the other findings *hoc statu*, and remit to the Lord Ordinary to proceed as he shall see cause.'

J. PRINGLE, W. S.—D. CLEGHORN, W. S.—M'RITCHIE & MURRAY, W. S.—Agents.

Sir D. MONCREIFFE and Others, Advocators.—*Key*. No. 216,  
J. RAMSAY and Co., Respondents.—*Clerk*—*Mac-*  
*nochie*.

*Servitude—Water*.—By feu-charter, the late Baron Moncreiffe conveyed certain lands to J. Higginson, 'with the privilege of collecting all the water that flows from the said rock, or through the sluice on the top thereof when shut, and conducting the same by spouts or otherwise, for the uses and purposes of the houses to be built by the said John Higginson upon the said lands.' On the top of the rock referred to, the barony mill and mill-dam of Moncreiffe were situated; and a dispute having arisen between the miller and Ramsay and Company, (who had bought the feu, and erected a brewery on it), as to their respective rights to the use of the water, the Lord Ordinary, in an advocacy, remitted to an engineer to report 'in what manner the most ample and permanent supply of water can be obtained for the use of the mill, and the proper course to be followed, in order to give to Ramsay and Company the most ample and permanent supply of water, after serving the reasonable and necessary uses of the mill.' The engineer having suggested a plan, the Lord Ordinary decerned in terms thereof; and the Court adhered.

Dec. 1, 1821.

SECOND DIVISION.

Lord Boston.

F.

G. DUNLOP, W. S.—J. THOMSON, W. S.—Agents.

No. 217. J. J. and A. DOUGLAS and Co. and Others, Petitioners.—*Bell—Ivory.*

J. WATSON and Others, Respondents.—*Moncreiff—More.*

Dec. 1, 1821.

*Bankrupt—Sequestration—Removal of Trustee.—*

SECOND DIVISION.

B.

In a competition for the office of trustee on M'Dougall's sequestrated estate, Watson was confirmed by the Court. Thereafter Denny in his own name, and as mandatory for an alleged majority of the creditors, called a meeting by advertisement to remove Watson, without previously applying to him or to the Court. He and another mandatory were the only persons who attended the meeting; and, without assigning any grounds, they declared Watson removed. Two petitions were then presented to the Court, one by Douglas and Company and others, the mandants, praying for warrant to call a meeting to choose a new trustee in room of Watson; and another by Watson, the trustee, and his party, to find the meeting illegal, and to rescind the resolution. The points were,—1. Whether the meeting had been legally called? And, 2. If so, whether it was competent to remove a trustee without cause shewn? The Court held 'the meeting to have been irregular, incompetent, and illegal, and declare the resolutions, and other acts and proceedings following thereon, to be null and void, and of no effect;' therefore, refused Douglas and Company's petition, and sustained Watson's complaint; and found that it was unnecessary to decide the second point.

Two Judges were of opinion that cause must be shewn; and all concurred in holding this an incompetent pro-

ceeding, for the purpose of overcoming a successful candidate.

MACMILLAN & GRANT, W. S.—P. CAMPBELL,—Agents.

J. J. and A. DOUGLAS and Others, Petitioners.—*Bell*  
—*Ivory*.

W. JEFFREY and Others, Respondents.—*Moncreiff*  
—*More*.

No. 218.

The circumstances and decision in this case were precisely the same as in the preceding one. The only difference was, that the questions arose in another sequestration.

Dec. 1, 1821.

SECOND DIVISION.  
B.

MACMILLAN & GRANT, W. S.—W. & A. G. ELLIS, W. S.—Agents.

Sir M. MALCOLM, Petitioner.—*Forsyth*.

W. MALCOLM and Others, Respondents.—*Robinson*.

No. 219.

*Process—Judicial Sale*.—Sir Michael Malcolm, proprietor and heir of entail of Grange, obtained authority to sell certain parts of the estate for redemption of the land-tax, and payment of a bond of provision with which the lands were burdened; and a trustee was appointed for carrying through the sale. In the articles of roup approved of by the Court, it was provided, that out of the price the trustee should, in the first place, pay into the Bank of England a sufficient sum to redeem the land-tax; and, secondly, 'pay off and discharge the sums contained in the before-mentioned bond of provision and agreement, whole interest due thereon, and expences attending the same;' and 'upon the purchaser's making payment of the price to the said trustee, and upon the said trustee's having applied the same as afore-

Dec. 4, 1821.

FIRST DIVISION.  
D.



‘ said, evidence thereof being produced, the said Sir  
 ‘ M. Malcolm shall be bound and obliged to grant and  
 ‘ subscribe a formal and valid disposition of the fore-  
 ‘ said subjects to the purchaser, containing the usual  
 ‘ and necessary clauses,’ &c. But, in order to meet  
 the views of a purchaser, a sale was concluded, on  
 the condition, ‘ that unico contextu, et simul et semel  
 ‘ with payment of the price which may be offered,  
 ‘ the seller shall be bound and obliged to purge and  
 ‘ clear the foresaid lands of all encumbrances ; and  
 ‘ farther, upon payment of the price, to grant a  
 ‘ formal and valid disposition of the said lands and  
 ‘ others to the purchaser, and without awaiting the  
 ‘ application of the said price.’ The creditors in the  
 bond having objected to this alteration, the Court  
 ordered ‘ the sale to be carried into execution in all  
 ‘ respects conform to the original articles of sale ap-  
 ‘ proved of by them.’

MARTIN & STEVENSON, W. S.—J. TAYLOR,—Agents.

**No. 220.** R. COLTART and Others, Petitioners.—*Bell—Maitland.*

The BANK of SCOTLAND, Respondent.—*Cockburn—Walker.*

Dec. 4, 1821.  
 FIRST DIVISION.  
 S.

*Bankrupt—Expences.*—At a meeting of the creditors of J. and M. Gordon, it was resolved to raise an action of reduction and repetition of certain alleged preferences granted to the Bank of Scotland. The agent of the Bank (who did not vote on the above resolution) then moved, ‘ That the expence of  
 ‘ the actions against the Bank of Scotland should, in  
 ‘ the first place, be incurred and defrayed by the  
 ‘ creditors voting for the institution of such pro-

' ceases, and not by the trustee, nor by the sequestered estate.' As the claim of the Bank exceeded that of all the other creditors present, this motion was carried by the vote of their agent. In a petition and complaint by the minority against this resolution, on the ground, that, in such a question, the Bank had no right to vote, the Court recalled it, and authorized the trustee to defray the necessary expenses, in the meantime, out of the general fund, reserving the question for future decision on whom these shall ultimately fall.

CORRIE & WELSH, W. S.—H. DAVIDSON, W. S.—Agents.

TRUSTEES of R. GORDON, Pursuers.—*Cranstoun—Baird—More.* No. 221.

J. HARPER and Others, Defenders.—*Moncreiff—Keay—Whigham.*

*Jus Crediti—Service.*—The late William Tait conveyed, by a trust-deed, the lands of Craig and Carse, in which he was feudally vested, to trustees. He had an only daughter, Margaret, to whom he provided, by this deed, the liferent, after his own death, of his estate; and appointed,—‘ That as soon after the decease of Margaret Tait, my daughter, as the heir of her body, if a male, shall arrive at the years of majority, or, if a female, shall arrive to such years, or be married, the trustees shall be obliged to denude themselves of the said lands in favour of such heir or heirs.’ The truster then provided, ‘ That in case of the decease of the said Margaret Tait, my daughter, without leaving issue descending from her body, the trustees shall be obliged to denude of the said lands in favour of such disponees as shall

Dec. 4, 1821.

FIRST DIVISION.  
Lord Alloway.  
D.

‘ be appointed by settlement made, or to be made, by  
‘ me; and, failing thereof, in favour of my heirs what-  
‘ soever.’ The trustees were infest during Tait’s life,  
under reservation of his right to the rents, and to set  
tacks; and soon thereafter he died. His daughter  
had been married to William Gordon, and died with-  
out any other issue than a son, Robert Gordon.  
When Robert Gordon attained majority, the trustees  
gave the possession of the lands to him, but he  
never made up titles. By a deed of settlement, he  
disponed the lands to trustees, who, after his death,  
brought an action of declarator and adjudication  
against the heirs of William Tait’s trustees, (who were  
now all dead), to have it found, ‘ That a person-  
‘ al right to the said lands and others, to the effect  
‘ of obliging the trustees, &c. to denude themselves  
‘ of the said trust-estate, and convey the same to the  
‘ said Robert Gordon, in terms of the said William  
‘ Tait’s trust-settlement, or otherwise to take up  
‘ the fee and property of the trust-estate by judicial  
‘ measures, was fully vested in the person of the said  
‘ Robert Gordon, upon his attaining the years of  
‘ majority, and was by himself effectually conveyed  
‘ to his trustees by his deed of settlement :’ and that  
this being found, the lands ought to be adjudged to  
his trustees. Appearance was made by the heirs  
whatsoever of William Tait, who contended, that by  
Robert Gordon having died without making up titles,  
his right to the lands ceased; and that they had now  
the exclusive right, as heirs of line of Tait, or, at least,  
as substitutes under his trust-deed. The Lord Or-  
dinary, after finding that the question at issue was,  
‘ Whether Robert Gordon having in him the equit-  
‘ able right of calling upon the trustees to denude,  
‘ and of vesting in himself a personal or feudal right

‘ to these lands, had acquired such a right as to enable him to transmit the same to his heirs or gratuitous disponees, to the prejudice of the heirs whatsoever of the truster, who, upon his failure, were substituted to him in the trust-deed ? ’—held, That Robert Gordon had the *jus crediti* under the trust-deed executed by his grandfather, William Tait ; and had in his person a vested right to compel the trustees to convey to him the lands in question, in terms of the trust-deed by which they held these lands ; and that he could have brought an action against the trustees to compel them to *denude* in his favour, without any service : that as Robert Gordon had conveyed all the right he had to the lands in question to the pursuers, he has conveyed to them the *jus crediti* which stood in his person ; and which enables them, in that character, to bring an action against the heirs of the trustees, in the same manner as the deceased himself could have done, to make up titles, and convey the subjects in question.’ After a hearing in presence, the Court adhered.

CORRIE & WELSH, W. S.—P. WISHART, W. S.—Agents.

L. HOUSTON and Others, Pursuers.—*Clerk—Ferguson—Jameson.*

LADY MONTGOMERIE and Others, Defenders.—*Cranstoun—Greenshields—Cockburn.*

Et c contra.

No. 222.

Dec. 4, 1821.

*Statute—Title to pursue—Personal Objection.*—

By act of parliament, a Company was constituted to

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form a canal between Glasgow and Ardrossan, and powers were conferred to raise money, partly by subscription, and partly by loan. After the canal had been in part made, Houston and others (who were the committee of management) were authorized to advance and to borrow large sums, in security of which the rates and profits of the canal were assigned to them. By these means the canal was completed between Glasgow and Johnstone. Thereafter they raised an action of relief and of declarator against the Company, founding on the assignation, to have it declared that they had right to draw the rates and profits of the canal until reimbursement of their advances. Certain members of the Company raised a counter-action of declarator, to have it found, that the rates should be applied to the purpose of farther extending the canal; and that it was contrary to the act of parliament to apply them in relief of any private debt. The plea of Houston and his party was,—1. That as their action was brought against the Company as a corporation, it was not competent for the defenders, as private individuals, to oppose it, or to pursue the counter-action. 2. That even although the construction of the statute contended for by the defenders was correct, yet they were barred from pleading it personali exceptions; in respect, (1.) Of acquiescence; and, (2.) That the money was in rem versam of the Company. The Lord Ordinary, after sustaining the title of the defenders to oppose Houston's action, and to pursue the one raised by themselves, found,—(1.) That the defenders 'having, when ' in the knowledge that the funds raised and subscribed in terms of the act of parliament, were to-

' tally inadequate for the making of the canal from  
' Glasgow to Johnstone, agreed that this part of the  
' canal should, nevertheless, be made, and that mo-  
' ney should be obtained for this purpose by means  
' of the trust-assignation libelled, are not entitled to  
' object to the rates and profits of the canal being  
' employed in terms of the trust-assignation, till the  
' advances made on the faith of it shall be repaid.  
' (2.) That the defenders, who contend that the  
' statute does not authorize the employing of the  
' rates and revenues of the canal in the manner pro-  
' vided for by the trust-assignation, and who, of  
' course, maintain that these rates and revenues  
' have in part arisen by means of money having  
' been expended on making the canal, which was not  
' raised in terms of the act of parliament, cannot be  
' allowed, while the transaction has been carried in-  
' to effect, and the money has been applied to the  
' purposes for which it was borrowed, to insist that  
' the provisions in the statute relative to rates and  
' profits of the canal, when these shall arise from  
' funds raised in terms of the act, shall be applied to  
' the case, as it is alleged, and argued by these par-  
' ties; and, therefore, his Lordship decreed in terms  
of the *declaratory* conclusions of Houston's libel. To  
this judgment the Court (after being equally divid-  
ed, and calling in Lord Pitmilley) adhered.

TOD & ROMANES, W. S.—RUSSELL, ANDERSON, & TOD, W. S.—  
Agents.

- No. 223. W. C. C. GRAHAME & Others, Suspenders.—*Jeffrey*  
—*Gillies*.  
J. HARVIE, Charger.—*Cranstoun*—*Greenshields*.

Dec. 4, 1821. In this case no general question was decided. The  
SECOND DIVISION. point at issue respected the right of the parties to  
Lord Pitmilley. float moss through each others lands, and depended  
M'K. for its decision on the import of a long proof. The  
Lord Ordinary and the Court decided in favour of  
Harvie.

GEO. DUNLOP, W. S.—CAMPBELL & MACN, W. S.—Agents.

- No. 224. M'DONALD & HALKETT, (Assignees of HENDRY),  
Pursuers.—*Cranstoun*—*Jameson*.  
J. & A. M'GROUTHER, Defenders.—*Jeffrey*—*Monteath*.

Dec. 4, 1821. *Principal and Agent*.—M'Grouthers, at Rio de Ja-  
SECOND DIVISION. neiro, were consignees of goods belonging to Hendry  
Lord Pitmilley. of Glasgow. In 1816, an agreement was made,  
M'K. by which Hendry conveyed to the M'Grouthers  
all the consigned goods, with the exception of a  
part lying in the custom-house of Rio de Janeiro.  
M'Donald and Halkett having got an assignation  
to that part, raised action against the M'Grouthers  
to account for the proceeds. They defended them-  
selves on the ground that Hendry, being indebted  
to them, they had a lien over the goods in the cus-  
tom-house. But the case turned upon the import  
of the agreement in 1816; and the Lord Ordinary

and the Court, holding that they were bound to account in terms of it, decerned against them.

D. BROWN, W. S.—G. NARIEB,—Agents.

T. GRIERSON, Pursuer.—*A. Bell.*

J. V. AGNEW, Defender.—*Solicitor-General—P. Robertson.*

No. 225.

*Interim Decree—Heir of Entail.*—This was an action against Agnew, an heir of entail in possession, for payment,—1. Of the expences of improvements on the estate, duly constituted, in terms of the act of parliament, by the preceding heir of entail; and, 2. For implement of a personal obligation which he had come under in favour of that heir. Agnew pleaded compensation on certain claims which formed the subject of an action under appeal, and in which he was appellant. The Lord Ordinary granted an interim-decree against him for the expences of the improvements; and the Court adhered.

Dec. 6, 1821.

FIRST DIVISION.

Lord Alloway.

S.

It was observed on the Bench, that unless interim-decree were given for these expences, the claim might be entirely lost, if the defender were to die in the meanwhile.

T. GRIERSON, W. S.—W. POLLOCK,—Agents.



No. 226.

Mrs. LAING Weir.—*Cranston—Mora.*S. LAING.—*Fullerton—Mancreiff.*

Competing.

Dec. 6, 1821.

FIRST DIVISION.

Lord Alloway.

H.

*Jus Crediti—Service—Foreign.*—By a disposition and settlement, John Weir conveyed to trustees certain islands and lands in Orkney, inter alia, ‘for payment of the free residue and remainder of my said estate and effects, heritable and moveable, &c., to John Laing, &c., and the heirs of his body;’ whom failing, to a series of substitutes, who were all required to assume the name of Weir. The deed contained no irritant or resolute clauses. On Weir’s death, John Laing took the name of Weir, and, in 1808, entered into a contract of marriage in England, and in the English form, whereby he bound himself to ‘convey, assign, and assure’ unto certain trustees, ‘according to the nature of the said estates and property, the aforesaid islands and lands, and all the estate, right, title, and interest of him, the said John Laing Weir, therein,’ in trust, for his intended spouse, in case she should survive him without issue. He predeceased his wife in 1818, without issue, and without having made up titles to the lands in Orkney. She thereupon raised a declarator, to have it found, that she had right to the property; and the trustees under John Weir’s settlement brought a multiplepoinding, to have it determined whether she or the next substitute had right to the estate. The Lord Ordinary conjoined the actions, and at first decided in favour of the wife; but the substitute having alleged that the lands were destined in a form which would be held an effectual en-

tail by the law of England, and would place them beyond the reach of the marriage-contract, he ordered the opinion of English counsel to be taken, 'whether, by the law of England, real property, destined to the same series of heirs, and in the same terms as the deed of settlement of John Weir, would be affected by marriage-articles executed in the same terms as those entered into by Colonel and Mrs. Weir, and carried off from the substitute-heirs or remainder men?' But the Court holding that as the question regarded an heritable estate in Scotland, and must be decided by the law of this country, recalled this interlocutor.

CUNNINGHAM & BELL, W. S.—RUSSELL, ANDERSON, & TOD, W. S.  
—Agents.

A. M'KENZIE, Pursuer.—*Forbes*.  
Misses M'LEOD, Defenders.—*Bell—A. Wood*.

No. 227.

*Repetition*.—The late Captain M'Leod, as tutor of the children of M'Leod of Vattan, transmitted certain sums of money to M'Kenzie, a banker, to be deposited in their name. M'Kenzie, however, instead of doing so, placed them to the credit of the private account of Captain M'Leod. Thereafter the children of M'Leod of Vattan obliged M'Kenzie to pay these sums to them, on which he raised an action of repetition of the amount against the defenders as representing Captain M'Leod, (now dead). The Lord Ordinary decerned in terms of the libel; and the Court adhered.

Dec. 7, 1821.

FIRST DIVISION.  
Lord Gillies.  
D.

M'KENZIE & MONYPENNY, W. S.—A. BURNS, W. S.—Agents.

No. 228

R. M'INTOSH, Suspender.—*Jardine.*  
J. WATT, Charger.—

Dec. 7, 1821.

SECOND DIVISION.  
Bill-Chamber.  
Lord Meadow-  
bank.  
M'K.

*Removing.*—Letters of ejection having been obtained by Watt against his tenant, M'Intosh, under the act of sederunt, the latter presented a bill of suspension, on the ground, inter alia, that at the date of the decree of removing he was not a year's rent in arrear. The Lord Ordinary refused the bill; but the Court, on an offer of caution at the bar, passed it.

J. HERIOT, W. S.—CAMPBELL & MACK, W. S.—Agents.

No. 229. J. ROBERTSON and Others, Petitioners.—*Mackenzie.*

Dec. 7, 1821.

SECOND DIVISION.  
M'K.

*Burgh Royal.*—Decree renewing in favour of the petitioners the powers conferred on them, 19th December 1819, to act as interim managers of the burgh of Inverness for twelve months, or till it was restored to a legal magistracy.

M'QUEEN & M'INTOSH, W. S.—Agents.

No. 230.

J. JACKSON, Petitioner.—*D. M'Farlane.*

Dec. 7, 1821.

SECOND DIVISION.  
B.

*Tutor—Factor Loco Tutoris.*—An application having been made by Jackson to be appointed factor loco tutoris on the estate of pupils to whom he was entitled to serve tutor at law, and the Court having refused to do so except on condition of his acting gratuitously, he withdrew his petition.\*

C. J. F. ORR—Agent.

\* See No. 238.

A. KELLY Claimant.—*P. Robertson.*

No. 231.

W. FERRIER, Common Agent.—*A. Connell.*

The Lord Ordinary had dismissed a claim by Kelly in the ranking and sale of Buchanan's estate. Dec. 7, 1821.  
SECOND DIVISION.  
 The claim was partly unvouched, and partly supported by documents which did not afford complete legal evidence. The Court adhered as to the part unvouched; but remitted to his Lordship to hear parties quoad ultra. Lord Cringletie.  
F.

D. M'TAVISH, W. S.—W. FERRIER, W. S.—Agents.

MOFFAT'S TRUSTEES, Pursuers.—*Corbet—Cranstoun.*

No. 232.

GRAY'S TRUSTEES, Defenders.—*Clerk—Jardine—  
Ro. Bell.*

*Husband and Wife—Donatio inter Virum et Uxo-* Dec. 7, 1821.  
*rem—Title to pursue.*—James Moffat and Catherine Gray had been married for many years, when the latter, in 1793, purchased certain lands, and took the titles, and also a personal bond, in her own favour, exclusive of her husband's *jus mariti*. In 1803, they, by a mutual deed of settlement, disposed the lands to themselves, in *liferent*, and to Andrew Gray, in fee, and appointed trustees for special purposes. The deed contained a power to revoke; and, in 1809, Catherine Gray, without the knowledge of her husband, revoked it, and disposed the subjects in favour of trustees, for purposes different from those in the mutual deed. She died in the course of the same year without issue, after which her revocation being discovered by her husband, he also revoked, and raised an

SECOND DIVISION.  
Lord Bannatyne.  
M'K.

action of reduction,—1. Of the title-deeds and bond acquired by his wife to the exclusion of his *jus mariti*: 2. Of the mutual settlement in 1808; and, 3. Of the trust-disposition in 1809; to the effect of having it found that he had the sole right to the lands, and the contents of the bond. The grounds on which he rested were,—1. That the funds with which the lands and bond had been purchased, were acquired by his wife by succession to her brother *stante matrimonio*, and belonged to him *jure mariti*, and over which she had no right. 2. That if she had any right, it was by donation, which he had revoked.

The defences by her trustees were,—1. That there was no evidence that the lands and bond had been acquired from funds falling under the *jus mariti*. 2. But assuming this to be the fact, the presumption of law *post tantum temporis* is, that the funds were given to the wife not as a donation, but in remuneration. 3. That although they were to be held as given in donation, yet he was not entitled after his long acquiescence, and after the death of his wife, to revoke. 4. That as the *jus mariti* extends only over the rents of the heritable property of the wife, and as there was here no room for the courtesy, so there was nothing which the husband could resume: And, 5. That, at all events, his claim can extend to only one-half of the money with which the land was purchased, and not to the land itself.

The Lord Ordinary found it proved that the lands and bond were bought with funds falling under the *jus mariti* of James Moffat; that ‘ the right he had to revoke the titles of lands acquired from such funds, or ‘ the personal bond obtained from part thereof, so far ‘ as to the prejudice of his interest in them under his

‘ jus mariti, is equally competent to be exercised after  
‘ the death as it was during the life of the said Catherine Gray: that it affords a sufficient title to call  
‘ for production of and challenge the titles of these  
‘ lands, and of the personal bond, so far as conceived  
‘ in terms exclusive thereof, and to the prejudice of  
‘ his jus mariti, and of all the settlements of the  
‘ same, so far as made on the supposition of their  
‘ being her absolute property, to the effect of its  
‘ being determined to what extent he is entitled to  
‘ challenge the same, so far as it can be shewn that  
‘ they are revocable as to the prejudice of his jus mariti; and, on these grounds, repels the objection to  
‘ the title of the pursuer to insist in the present reduction and declarator.’ To this judgment the Court finally adhered on the 8th March 1816, in respect that it merely decided the question of title, and remitted quoad ultra to his Lordship. Thereafter Moffat died, having left his property to trust-disponees, who sisted themselves as pursuers. The case was thereafter reported; and the Court, after having pronounced an interlocutor in favour of Gray’s trustees, altered it, and sustained  
‘ the reasons of reduction of the disposition and  
‘ trust-settlement executed by the late Catherine Gray, in so far as it imports a revocation or alteration of the disposition and settlement dated the  
‘ 26th of April 1803, executed by the said C. Gray and her husband, and decern, and remit to the Lord  
‘ Ordinary to proceed accordingly;’ and they afterwards adhered.

No. 233.

T. WADDELL, Pursuer.—*M'Farlane.*  
 J. GILCHRIST and Others, Defenders.—*Cunningham—*  
*Jameson.*

Dec. 7, 1821.

SECOND DIVISION.

Lord Pitmilley.

M'K.

*Small Debt Act.*—*Statute 39, and 40. Geo. III,*  
*c. 46.*—Decree in absence was pronounced against  
 Waddell in the small debt court at the instance  
 of Gilchrist. Having been charged on it, he pre-  
 sented a petition to two justices of the peace, who  
 granted a sist till parties should be heard. He  
 did not consign the debt; but intimated the sist to  
 Gilchrist. The latter, however, pointed Waddell's  
 effects. An action of reduction of the decree and  
 execution of poinding, and of damages, was then in-  
 stituted against Gilchrist and the justice of peace  
 clerk, on the grounds,—1. That the debt was not just-  
 ly due: 2. That the extract of the decree was irre-  
 gular, in respect the record was not kept in terms of  
 § 10 of the small debt act, as it consisted merely of  
 a roll of the parties names, sums claimed, and ab-  
 breviated of the judgment, signed by the preses; and,  
 3. That the poinding had been executed in violation  
 of a sist by the justices. The Lord Ordinary assoil-  
 zied the defenders, in respect ' that viewing the de-  
 ' cree of the justices as a decree in absence, the pur-  
 ' suer did not follow out the course pointed out by  
 ' the statute; and that if parties had been heard be-  
 ' fore the justices, the decision of the justices on the  
 ' merits of the dispute, as stated by the pursuer him-  
 ' self, would not have been one of such a description  
 ' as ought to have been reviewed in this Court on

‘ the ground of alleged iniquity or oppression.’ To this judgment the Court adhered.

The Judges were agreed, that there was no objection to the mode of keeping the record.

TOD & WRIGHT, W. S.—CAMPBELL & CLASON, W. S.—Agents.

Mrs. M’INTYRE, Advocator.—*Forsyth—Moncreiff.* No. 234.  
D. M’INTYRE, Respondent.—*Clerk—Ruithersford.*

*Divorce—Advocation.*—Mutual actions of divorce were raised by Mr. and Mrs. M’Intyre. The Commissaries found both of them guilty of adultery ; but, before pronouncing decree of divorce, appointed them to state their pleas on the effect of mutual guilt on their patrimonial interests.

Dec. 8, 1821.

SECOND DIVISION.

Bill-Chamber.

Lord Meadowbank.

B.

An agreement was afterwards entered into, settling their interests. To enforce it, an action was raised by M’Intyre against his wife before the Court of Session.

The wife then prayed the Commissaries to decide the question of divorce, which they refused to do. Against this judgment she presented a bill of advocation, which M’Intyre objected to as incompetent, on the ground that there was no final decree. But the Lord Ordinary remitted to the Commissaries ‘ to proceed and finally determine the mutual actions of divorce, in so far as the same respect the dissolution of the marriage between the parties : and in respect of the action at Captain M’Intyre’s instance, depending before Lord Pitmilley, to sist procedure quoad ultra till the issue of that cause ;’ and the Court adhered.



The Court considered the question of mutual guilt final before the Commissaries; and that they acted irregularly in delaying to pronounce sentence of divorce till the point of law relative to the patrimonial interests was decided, which (independent of the private arrangement) might possibly prove hypothetical.

D. FISHER,—A. CRAUFUIND, W. S.—Agents.

No. 235.

A. M'DOWALL and Others, Pursuers.—*Baird*.

A. M'DOWALL, Defender.—*Bell—Greenshields*.

Dec. 8, 1821.

SECOND DIVISION.

Lord Pitmilley.

B.

*Expences—Interest*.—The Judge-Admiral, in an action at the instance of Andrew M'Dowall and others against Alexander M'Dowall, found the defender liable in damages, in part of the expences of process, and in the expences of extract. Both parties raised a reduction of this decree; the defender, on the ground that he ought to have been assoilzied,—and the pursuers, that they ought to have got larger damages. The Lord Ordinary decerned for a greater sum of damages to the pursuers; quoad ultra confirmed the judgment of the Admiral; granted interim-decree for a large sum of expences, and (although not concluded for) allowed interest on the expences of extracting the Admiral's decree, (which amounted to £185), from its date, 19th January 1815. To this judgment the Court adhered.

The Lord Ordinary, in a note, stated, that, in the circumstances, he considered himself bound to apply the principle of *Groat against Sinclair*, 15th May 1819, viz.  
 ' That when a considerable sum of money, constituting  
 ' a part of the expences found due by the Court, has  
 ' been necessarily advanced years before the date of  
 ' the decree, the interest of the sum advanced is act-



‘ only a part of the expences defrayed. This principle removes the difficulty of the summons not concluding for interest on the expences.’ His Lordship also observed, that Warner against Cuninghame, 29th May 1813, ‘ is not correctly reported in the Faculty Collection. Interest was there awarded on a sum found due by an interlocutor in February 1802, and on another sum of expences found due by an interlocutor in February 1809, from and after the lapse of a year from the date of the interlocutor.’ The Court, however, considered this a very special case; and it was remarked, that as the expences of extract were decreed for by the Admiral, interest was due upon them equally as on the principal sum in the decree.

J. R. SKINNER, W. S.—JAS. WEMYSS, W. S.—Agents.

J. CRAWFORD.—*Bell—Skene.*

No. 236.

C. GRACE.—*Clerk—Forsyth—Moncreiff—Jameson.*  
Competing.

*Bankrupt—Trustee—Expences.*—A competition having arisen between Crawford and Grace for the office of trustee on Meldrum’s sequestrated estate, the former obtained decree of confirmation, which he extracted. Grace then presented a petition for recal of the extract as irregular, which the Court granted, and remitted to the sheriff in the usual form, ‘ re-serving consideration of the expences till the final issue of the discussion.’ In the meanwhile, the sequestration had been recalled;\* and Grace having thereafter prayed the Court to advise the petition on the point of expences, they found, ‘ that it is competent, notwithstanding the recal of the sequestra-

Dec. 8, 1821.

SECOND DIVISION.

M’K.

\* See No. 163.

‘ tion, to advise the petition and answers mentioned  
 ‘ in this petition, not for the purpose of deciding in  
 ‘ the competition for the office of trustee in a seques-  
 ‘ tration now recalled, but for the purpose of dispos-  
 ‘ ing, in such mode as may be suitable, (in the pre-  
 ‘ sent circumstances of the case), of the prayer of the  
 ‘ petition, as well as of considering and determining  
 ‘ upon any claims of expences ~~hinc inde~~: find it now  
 ‘ unnecessary to pronounce any interlocutor on the  
 ‘ merits of the question discussed in the petition, &c.;  
 ‘ and find the petitioner, John Crawford, liable in the  
 ‘ expences incurred in the proceedings under the ap-  
 ‘ plication for recalling the act confirming his no-  
 ‘ mination as trustee.’

A. MONYPENNY, W. S.—T. WALKER,—Agents.

No. 237. EARL of WEMYSS, Pursuer.—*Thomson—Jeffrey—  
 Mackenzie—Forbes.*

DUKE of QUEENSBERRY'S EXECUTORS.—*Cranstoun—  
 Irving.*

and

M. JOHNSTONE, Defenders.—*Moncreiff—Cuning-  
 hame.*

Dec. 11, 1821.

FIRST DIVISION.

Lord Hermand.

H.

*Tailzie—Tack.*—The Court had found that the late Duke of Queensberry had no power to let leases of the entailed estate of Niedpath upon grassums,\* and in diminution of the rental; and, therefore, reduced all those which had been let in this way. Among those brought under reduction was the lease of the farm and inn of Crook. In 1780, a lease was granted of it till

\* See Fac. Coll. Earl of Wemyss against Murray and others, November 17, 1815.

1805, on a grassum of £115, and a rent of £12, and payment of the public burdens. This lease was renounced in 1791, and a new one granted for fifty-seven years, at a rent of £12:15:5, but the public burdens were not included, and no grassum was paid. Again, this lease was renounced in 1807, and a new one was granted on the same terms, for any period between thirty-one and nineteen years for which the Duke should be found to have powers to give a lease. The Court (altering the Lord Ordinary's judgment) held, that this lease had not been let in violation of the Duke's powers; restricted it to twenty-one years, and assoilzied the tenant. But the House of Lords having remitted the case for reconsideration, the Court, on the report of the Lord Ordinary, found, that, 'under the whole circumstances of the case, the tack 1807 falls to be regarded as having been granted in consideration of a grassum, and in diminution of the rental;' and, therefore, reduced the lease.

RUSSELL, ANDERSON, & TOD, W. S.—J. TWEEDIE, W. S.—J.  
LAMONT, W. S.—Agents.

J. JACKSON, Petitioner.—*D. M'Farlane.*

No. 238.

*Factor Loco Tutoris.*—This was an application of the same nature, and by the same party, as that noticed at No. 280. The Court refused to name the petitioner factor loco tutoris, unless he should engage to act gratuitously, seeing he was entitled to be served tutor at law. And having thereafter given in a minute to that effect, he was appointed to the office.

Dec. 11, 1821.

FIRST DIVISION.  
S.

C. J. F. ORR, W. S.—Agent.

No. 239.

ROBERTSON & Co., Pursuers.—*Brodie*.  
GALLOWAY & REID, Defenders.—*Pyper*.

Dec. 11, 1821.

FIRST DIVISION.

Lord Alloway.

S.

*Cautioner—Guarantee—Writ—Statute 1681, c. 5.*

—Galloway and Reid granted the following obligation to Robertson and Company, 29th November 1820.—Mr. T. Kincaid informs us that he has ‘to account to you for three sales,’ (which are here specified), ‘which we agree to see done within fourteen days from this date, provided you advance him to-day £60 against a shipment of 100 bolls barley and 50 bolls oats from Dundee.’ Robertson and Company advanced the £60, and Kincaid thereafter indorsed to them the bill of lading of the above shipment. Besides the debt due by Kincaid mentioned in the letter, he owed a considerable balance to Robertson and Company, who, on his bankruptcy, applied the proceeds of the cargo in liquidation of it: and on the letter an action was raised against Galloway and Reid. They pleaded in defence,—1. That the letter was ineffectual; for, although subscribed by them, it was neither holograph, nor tested in terms of the act 1681. 2. That Robertson and Company had a right to the cargo to the extent only of £60, and were bound to apply the balance in extinction of this obligation. The Lord Ordinary, in respect ‘that the conditions of the letter of guarantee libelled on were implemented by the pursuers, and that Thomas Kincaid had failed to account to the pursuers for the proceeds of the sales of goods mentioned in said letter within the fourteen days stipulated, and that the same have not hitherto been paid to them,’ repelled the

defences, and decerned against Galloway and Reid.  
The Court adhered.

JOHN ROBERTSON, W. S.—JAS. STUART, W. S.—Agents.

J. WILSON, Suspender.—*Moncreiff—Grahame.*  
POLLOCK, GILMOUR, & Co., Chargers.—*More.*

No. 240.

*Conditional Sale—Suspension.*—Pollock, Gilmour, and Company sold a tenement to Wilson, of which the price was to be payable by instalments; but it was conditioned that if two instalments were allowed to run into a third, the sellers should have power forthwith to expose the subjects to public sale. It being alleged that this event had occurred, a sale was advertised; against which Wilson presented a bill of suspension and interdict. The Lord Ordinary passed the bill on caution, and granted interdict, as it was not clear that two instalments had run into a third, and as the case resolved into a count and reckoning. The Court adhered, but ordered farther caution for all damages which might be suffered by the sale being stopped.

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FIRST DIVISION.  
Bill-Chamber.  
Lord Cringletie.  
D.

A. PATERSON—W. & A. G. ELLIS, W. S.—Agents

SIR G. M. LOCKHART and Others, Suspenders.—  
*Mackenzie.*

No. 241.

J. M'NIELL, Charger.—*Jameson.*

*Road Statute.*—A committee appointed by a district meeting acting under a statute passed in 1800, had recommended a road in the island of Gigha to be shut up; but, in the meanwhile, a new statute had been passed, (1816), repealing the former, and enacting

Dec. 11, 1821.

SECOND DIVISION.  
Lord Cringletie.  
F.

that no road should be shut up except by order of a general meeting. In a suspension of an order of a district meeting, obtained by M'Niell posterior to the date of the statute 1816, to shut up the road, the Lord Ordinary suspended the letters simpliciter; and the Court adhered.

LOCKHART & KENNEDY, W. S.—CAMPBELL & CLASON, W. S.—  
Agents.

No. 242.

J. DENNISTOUN.—*Jameson—A. Wood.*

A. C. DENNISTOUN and Others.—*Cuninghame.*

Misses DENNISTOUN.—*Matheson.*

Competing.

Dec. 12, 1821.

FIRST DIVISION.  
Lord Gillies.  
D.

*Clause—Heir and Executor.*—The late Mr. Dennistoun, by a settlement in 1815, disposed his whole property, heritable and moveable, to trustees, excepting a house in Glasgow, which he conveyed to his wife, in liferent, and his eldest son, in fee. This house was burdened with a debt of £2,000. The trustees were empowered to manage, or to convert into money the trust-estate, for the purposes,—1. 'Of payment of all my lawful debts:' 2. Of securing a jointure to his wife: 3. 'To hold the rest, residue, and remainder of the whole premises, and of the proceeds of the same, for behoof' of his children, 'in the proportions after mentioned, viz. The eldest of my sons in life at the time of my death a quadruple proportion, or four parts or shares, and each of my other sons, or their issue, a double portion, or two parts or shares; and each of my daughters a single portion or share; and providing always, that in the event of the shares or provisions here-

‘ by made in favour of each of my daughters under  
‘ the foresaid division being less than £5,000, then  
‘ the shares of each of my said daughters shall be  
‘ increased to the sum of £5,000, by payments or  
‘ deductions from the shares or provisions of my sons,  
‘ my eldest son paying or suffering a deduction of a  
‘ sum double of my other sons’ The deed then pro-  
vides, that the shares of a certain number of the  
daughters failing before marriage or majority, shall  
accresce to their sisters: that the trustees on the ar-  
rival of either of these events, shall pay to each of  
the surviving daughters £2,000, and secure the re-  
mainder to them in liferent, and their heirs in fee,  
‘ including the interest of their whole provisions  
‘ that may be saved and accumulated up to the time  
‘ of their respectively attaining to majority or mar-  
‘ riage.’ Mr. Dennistoun died soon after the date  
of the deed, leaving a numerous family in minority.  
When his eldest son arrived at majority, the trust-  
estate had been depreciated to a great extent; and  
the trustees finding difficulties in settling the differ-  
ent claims, raised a multiplepinding, to have the  
rights of parties fixed by the Court. It was main-  
tained,—1. By the widow, that the trustees were  
bound to pay her jointure, and the interest of  
the debt secured on the house, from the trust-funds.  
2. By the eldest son, that from the same source  
the debt itself was to be discharged, under the  
clause binding the trustees to pay off all the  
truster’s debts. 3. The daughters claimed right,  
at all events, to £5,000, and interest from the  
first term after their father’s death, and to the  
shares of two daughters who had died: And, 4.  
All the sons contended that the shares of the par-



ties were to be arranged not with reference to the amount of the estate at their father's death, but in relation to the extent of it, when it became divisible on their arriving at majority; that the daughters should suffer a proportional share of the deficiency; and that they had no right to interest, as claimed by them. The Lord Ordinary having reported the case, the Court found, ' that the widow is entitled to the ' free liferent of the house in Glasgow; that the interest of the heritable debt, and also the widow's ' jointure, are to be paid by the trustees, during the ' lifetime of the widow, out of the general fund in ' question, so as to affect the provisions of the sons ' and daughters rateably: that the principal sum ' (i. e. the heritable debt) must be paid by the heir, ' if he takes the house under his father's settlement: ' that by the will of the late Mr. Dennistoun, each ' of the daughters is entitled to the provision of ' £5,000 sterling thereby settled, with interest accruing thereon from the term of Martinmas 1815 ' years, being the first term after his death, and also ' to the shares of the deceased sisters, equally among ' them, deducting the payments made for their board ' and education since their father's death; and remitted the case quoad ultra to the Lord Ordinary.

CAMPBELL & CLASON, W. S.—M. LINNING, W. S.—A. LAMONT,  
W. S.—Agents.

No. 243.

D. FINLAYSON, Pursuer,—*Clerk—P. Robertson.*  
D. MONRO and TUTOR, Defenders.—*Cranstoun—*  
*Moncreiff—Matheson.*

Dec. 12, 1821,

SECOND DIVISION, *Statute 10. Geo. III, c. 51—Tailzie.*—Charles  
Lord Cringletie. *Monro, an heir of entail in possession, let a lease of*

part of the entailed estate to Finlayson, and assigned to him the claims competent under the 10. Geo. III, c. 51, for improvements to be made on the farm. When Finlayson was about to begin his improvements, intimation was made to ' John M'Kenzie, as being the next heir of entail living within Great Britain or Ireland after the said Charles Monro, and the heirs of his body.' After the death of Charles Monro, he was succeeded by his son, David, against whom Finlayson raised action for three-fourths of the expences of the improvements. The defence was, that intimation had not been made in terms of § 11 of the statute, as John M'Kenzie was not an heir of entail; and it was alleged that the next heir was resident in America. Finlayson denied that there was any such heir, and maintained, that, even if there were, the intimation must be held good, as John M'Kenzie was his nearest male relation within Great Britain or Ireland. On the report of the Lord Ordinary, the Court, in respect that John M'Kenzie was not an heir of entail, found, ' that the intimation in this case was not made in terms of the statute.' But as the parties were at variance as to the fact, whether there were any other heirs-substitute after Charles Monro, and the heirs of his body, a remit was made to the Lord Ordinary to hear parties on this point, and also on a claim for meliorations.

J. PEDDIE, W. S.—J. GORDON, W. S.—Agents.

No. 244.

D. KENNEDY, Pursuer.—*Jameson—Fletcher*.  
 L. M'KINNON and D. M'LEOD, Defenders.—*Matheson*.

Dec. 13, 1821.

FIRST DIVISION.

Lord Alloway.

S.

*Messenger—Cautioner.*—M'Donald, a messenger, was employed to execute a precept of arrestment from the Court of Admiralty against a vessel belonging to Kennedy. The vessel was lying at anchor in a roadstead, about to sail with a cargo, when the messenger went aboard, took possession of her, and removed the machinery of the pump. The vessel having been thereupon deserted by Kennedy and the crew, the messenger and his assistants, in attempting to navigate her to a secure place, ran her on shore, and the vessel and cargo were lost. An action of damages was then raised by Kennedy before the Court of Admiralty against the messenger, and M'Kinnon and M'Leod, his cautioners. The defenders having been assoilzied on a special ground, Kennedy brought an action of reduction of the absolvitor. The defences on the part of the cautioners were,—1. That as the precept of arrestment was directed to macers of the Court of Admiralty, they were not responsible for any act done by the messenger acting as their deputy. 2. That they were only responsible for damages done to the employers of the messenger, and not to those against whom they were employed. The Lord Ordinary, 'in respect that the diligence was not executed in the manner it ought to have been; that the messenger was not entitled to carry off the spear of the pump, or to take possession of the ship and cargo, or to remove her from the place where she was at anchor; both the messenger and his cautioners must

' be liable for any damages which the pursuer can qualify as having arisen from the messenger having improperly executed that warrant.' And his Lordship repelled the second plea, in respect the question had been settled by the case of Grant against Forbes, 8th July 1758, (M. 2081), affirmed on appeal. The messenger acquiesced; and on a petition by the cautioners, the Court adhered.

C. McDONALD, W. S.—T. McKENZIE, W. S.—Agents.

Major A. CAMERON, Pursuer.—*Moncreiff—Murray.*  
J. RUSSELL, Defender.—*Cranstoun—Jeffrey—Cockburn.*

No. 245.

*Meditatio Fugæ—Mandatory.*—Mr. Russell presented a petition, as the mandatory of an Irish house, Oswald, Howall, and Company, to the judge ordinary, for a warrant to apprehend Major Cameron as in meditatione fugæ. He there stated, that Cameron was indebted in a large sum to Oswald, Howall, and Company; that they believed in their conscience he was about to leave the country in order to defraud them, and that they had emitted an affidavit to the verity and justness of the debt. Mr. Russell swore, 'that what is contained in the foregoing petition is truth, to the best of his knowledge and belief;' and that he believed Cameron was meditating flight. It afterwards turned out, that, instead of being debtor, Cameron was creditor of Oswald, Howall, and Company. An action of damages was then raised by him against Russell, libelling on various irregularities, and particularly on the fact that no debt was due. In defence it was pleaded, *inter alia*, 'That even although

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FIRST DIVISION.  
Lord Gillies.  
D.

‘ no debt was due, the defender is not liable in an action of damages for what he did as mandatory.’ And the Lord Ordinary found, that ‘ Mr. Russell is not responsible for the oath of verity he emitted qua mandatory as to the existence of the debt; and to this extent sustains the defences, and absolves him from the conclusions of the libel.’ To this judgment the Court adhered.

It was observed by one Judge, that the bona fide belief of Oswald, Howall, and Company that a debt was due, would have protected even them from an action of damages.

R. M’KENZIE, W. S.—A. DOUGLAS, W. S.—Agents.

**No. 246.** MRS. G. CUNNINGHAME and HUSBAND, Pursuers.—  
*Jeffrey—Monteath.*  
C. CUNNINGHAME, Defender.—*Moncreiff—Mail-land.*

Dec. 13, 1821, *Interest—Presumed Intention.*—Mr. Cunninghame  
SECOND DIVISION. destined an estate in the West Indies to his sons, John,  
Lord Cringletie, Alexander, and Charles, seriatim, and burdened each  
F. of them, in the event of succession, with provisions to  
each of his daughters, and ‘ with interest of these provisions from and after the first term of Whitsunday or Martinmas that shall happen after my decease.’ John succeeded to the estate, but soon thereafter died. His brothers and sisters being uncertain whether he had altered the destination, entered into an agreement, (1st October 1808), by which, on the one hand, the estate was divided equally between Alexander and Charles; and, on the other, each of them became bound to pay to each of the sisters ‘ the

' sum of £400 sterling ; and upon payment of, or receiving bond for the same,' the sisters obliged themselves to discharge all claims competent to them by the will of their father through the death of their brother, John. Nothing was mentioned as to interest or a day of payment ; but, in 1809, Alexander granted his bond, in which interest was made payable from Martinmas 1811. In 1817, an action was raised against Charles by his sister, Grace, for payment of the £400, and interest from a year after the date of the agreement. The Lord Ordinary decreed against him for the principal, and for interest from the date of citation. But the Court (by a majority) so far altered, as to find interest due from the same period as in Alexander's bond.

The majority of the Court held, that the circumstances of the case shewed that it was the intention of the parties that interest should be due ; and, after considerable discussion, the period above mentioned was fixed as the terminus a quo.

G. NAIRN—A. GOLDIE, W. S.—Agents.

A. STEWART, Suspender.—*Jeffrey—Small Keir.*  
R. WRIGHT and P. SCOTT, Chargers.—*Keay—Robt. Thomson.*

No. 247,

*Bill of Exchange—Proof.*—Stewart, drawer of a bill, suspended a charge on it by Wright, agent at Crieff for the Commercial Bank, on the ground of the want of intimation. The Lord Ordinary allowed a proof ; and thereafter the term was finally circumduced against both parties. Two questions arose.—1. Whether there was legal evidence of inti-

Dec. 13, 1821.

SECOND DIVISION.  
Lord Pitmilley.  
R.

mation,—the proof consisting of a certified copy of a letter of intimation, within the lawful period, by Wright, (who absconded before he was examined as a witness under an order to that effect),—a marking on the back of the bill by him, and the testimony of a single witness, who swore he saw the letter written and put into the post-office of its date, and the marking made of the same date on the bill? 2. Whether it was now competent to allow the suspender a proof of certain allegations? The Lord Ordinary held the intimation proved, and refused the proof offered. The Court (by a majority) adhered.

A. GREIG, W. S.—J. A. CAMPBELL, W. S.—Agents,

No. 248. C. FALCONER, TRUSTEE for the Creditors of CAMPBELL of Silvercraigs, Pursuer.—*Bell—Clephane*. Lieutenant-Colonel J. CAMPBELL, Defender.—*Moncreiff—Walker*.

Dec. 14, 1821.

FIRST DIVISION.

Lord Gillies.

D.

*Ranking and Sale—Prescription—Extinction of Debt.*—The estate of Auchenbreck was sold under a ranking and sale, and part was bought by Campbell of Silvercraigs, of which the price was payable in 1760. Several of the debts were allocated on his purchase. In 1802, he sold his part to Colonel Campbell, for which the latter granted bond under this condition,—‘ That no part of the  
‘ foresaid sum shall be payable until all defects  
‘ in the titles to the aforesaid lands shall be supplied, and all debts and encumbrances shall be  
‘ paid and discharged; and, for that purpose, the  
‘ said James Campbell of Silvercraigs, by acceptance  
‘ hereof, binds himself, &c. to produce regular  
‘ searches of the different records for encumbrances

‘ affecting the said lands down to the 31st May  
‘ 1808; and likewise to produce satisfactory evi-  
‘ dence that the prices for which the aforesaid lands  
‘ were formerly purchased at judicial sales were paid  
‘ to the creditors having right thereto, or that these  
‘ prices were legally consigned for behoof of all con-  
‘ cerned.’ Campbell of Silvercraigs having granted a  
trust, the trustee raised a declarator of extinction of  
the debts, and of payment, against the creditors in  
the ranking and sale, on the ground of prescription  
by the lapse of forty years; and against Colonel  
Campbell, with an offer of caution for repetition in  
the event of distress. The creditors who were  
known were cited personally, and those who were  
not known, edictally, themselves and their represent-  
atives; and intimation was given in the Gazettes and  
different newspapers. Colonel Campbell objected,  
that decree in this action would not enable him to  
pay in safety, as,—1. The debts could not be lost by  
the negative prescription. 2. None of the creditors  
having appeared, the decree would be in absence; and,  
3. The act 1695, c. 6, and his bond, required payment  
or consignment. The Lord Ordinary on these grounds  
‘ found Colonel Campbell in hoc statu entitled to  
‘ retain in his hands a sum equal to the amount of the  
‘ debts affecting the estate, and to that extent as-  
‘ soilzied him from the conclusions of the action.’  
To this judgment the Court adhered, and thereafter  
refused a petition, ‘ reserving to the pursuer, of con-  
‘ sent, to bring an action of multiplepinding, as pro-  
‘ posed; and also, reserving all defences against the  
‘ same, as accords.’

JOHN ARCHD. CAMPBELL, W. S.—WALKER, RICHARDSON, &  
MELVILLE, W. S.—Agents.



No. 249.

J. GILMOUR, Pursuer.—*Cunninghame*.J. CAMPBELL, Defender.—*Boswell*.

Dec. 14, 1821.

FIRST DIVISION.

Lord Gillies.

H.

*Passive Title*.—Campbell being sued for a debt on the passive titles, as representing his father and brother, pleaded in defence,—1. Presumed payment; and, 2. The English statute of limitations. After a litigation of five years, the Lord Ordinary pronounced an interim-decree against him personally, as having pleaded peremptory defences; and the Court adhered.

HUNTER, CAMPBELL, & CATHCART, W. S.—ALEX. BOSWELL, W. S.  
—Agents.

No. 250.

P. M'ARA, Suspender.—*Cockburn*.D. CARRICK, Charger.—*Solicitor-General*—*Lockhart*.

Dec. 15, 1821.

FIRST DIVISION.

Bill-Chamber.

Lord Gillies.

D.

*Jurisdiction—Excise*.—The question here related to the competency of passing a bill of suspension of the sentence of an Excise court, on the ground of irregularity. The parties differed on the facts, but the general nature of the case was this:—M'ARA was cited to an Excise court on a charge of adulteration of tea and coffee. Part of the evidence (including that of the accuser) was adduced at one diet, and part at another. The justices who attended at these diets were (with one exception) different. In the sentence, which was briefly noted on the information, it was said that it had been awarded at the first diet by the justices who then formed the bench; but, in the extract on which execution was attempted, it was stated that the sentence had been pronounced at the second diet by the other justices. The Court, after

ordering production of the proceedings, altered the Lord Ordinary's interlocutor refusing the bill, which was offered on caution, and remitted to his Lordship to pass the bill.

A. P. HENDERSON—D. HEARNE, W. S.—Agents.

C. M'LACHLAN, Complainer.—*Hope.*

No. 251.

D. BLACK, Respondent.—*Clerk—Robertson.*

*Messenger—Process.*—Black, a messenger, apprehended M'Lachlan on a caption, and exacted from him bills, including not only the amount of the debt, but also the fees due to himself and party. A complaint was thereafter presented to the Court by MacLachlan, concluding for restitution of the bills, and for punishment. The Court found 'the complaint relevant and proven, that the respondent, David Black, did unlawfully compel the complainer, Colin M'Lachlan, while in his custody under diligence, to accept a bill or bills, which included fees and expences to him, the messenger, and his party;' and, therefore, suspended him from his office for three months; found him liable in full expences, and reserved action to M'Lachlan for damages, and his defences against any claim on the bills.

Dec. 15, 1821.

SECOND DIVISION.  
F.

It was observed, that the concurrence of the public prosecutor was not necessary in this complaint. The practice of messengers acting as agents for the parties at whose instance the diligence was executed, was strongly reprobated.

D. M'LEAN, W. S.—D. CAMERON, W. S.—Agents.

No. 252.

W. ELLIOT, Petitioner.—*Baird*.Sir J. L. JOHNSTONE'S TRUSTEES, Respondents.—*Clerk*.

Dec. 15, 1821.

SECOND DIVISION.

M'K.

*Execution pending Appeal.*—Sir J. L. Johnstone's trustees having appealed to the House of Lords against the judgment of the Court of 7th June 1821, (See No. 68), the petitioner prayed for interim-execution. But the Court, considering that, in the state of the accounts of the parties, they were not called on to award execution, refused the petition.

J. ORR—DALLAS &amp; INNES, W. S.—Agents.

No. 253.

J. M'INTOSH, Pursuer.—

P. M'INDOE, Defender.—*More*.

Dec. 18, 1821.

FIRST DIVISION.

Lord Alloway.

H.

*Process—Poor's Roll.*—M'Intosh, who was on the poor's roll, brought an action of damages against M'Indoe. After some procedure, the defender judicially offered the expences of process, and £40 of damages, which M'Intosh refused. The Court thereupon remitted to the counsel and agents for the poor to report, whether, after this offer, the pursuer had a *probabilis causa litigandi*; and they having reported that he had not, and ought to accept of the offer, the Court ordered his name to be struck off the poor's roll.

GEORGE GORDON—A. PATERSON,—Agents.

**MAGISTRATES of KINGHORN, Suspenders.**—*Cockburn* No. 254.  
—*Hope*.

**TRUSTEES of KINGHORN FERRY, Respondents.**—  
*Clerk—Moncreiff—Forbes*.

*Ferry—Statute 53. Geo. III, c. 125.*—By the a- Dec. 18, 1821.  
bove statute, trustees were appointed to furnish pass-  
age-boats on the ferry between Leith and Newhaven, SECOND DIVISION.  
on the one side of the Frith of Forth, and Kinghorn, Bill-Chamber.  
Burntisland, and Dysart, on the other. The burgh of Lord Meadowbank.  
Kirkaldy having a right to ply four ferry-boats be- M'K.  
tween Leith and its own port, the Trustees, in Novem-  
ber 1821, got a lease of three of these boats, and bound  
themselves to supply that ferry. The Magistrates of  
Kinghorn thereupon presented a bill of suspension  
and interdict against the Trustees plying at Kirkaldy,  
or any other place not named in the statute, on the  
ground, that as the Trustees had a monopoly of the  
ferry to Kinghorn, and were, by a special clause of  
the statute, limited to that port, Burntisland, and  
Dysart, so they were obliged to confine themselves  
to those places, and were not entitled to become les-  
sees of the Kirkaldy boats, which would be prejudicial  
to Kinghorn. The Trustees answered, that the clause  
was introduced merely in reference to certain custom-  
house regulations: that it did not confine them to  
the above ports, nor prevent them from being lessees  
of the Kirkaldy boats; and that the Magistrates of  
Kinghorn had no title to complain of any alleged  
violation of it. The Lord Ordinary having report-  
ed the bill, the Court refused it.

J. YOUNG—A. MONYPENNY, W. S.—Agents.

**No. 255. TRUSTEES OF KINGHORN FERRY AND MAGISTRATES OF KIRKALDY, Suspenders.—Clerk—Moncreiff—Forbes.**

**G. CRICHTON and Others, Respondents.—Cockburn—Hope.**

Dec. 18, 1821.

SECOND DIVISION.  
Bill-Chamber.  
Lord Meadowbank.  
M'K.

*Ferry.*—The question in this case was connected with the preceding one. The Trustees had got a lease of three of the Kirkaldy ferry-boats, which had been previously held by the London, Leith, and Glasgow Shipping Company. The latter having intimated their intention to continue to ply on that ferry, the Trustees and Magistrates of Kirkaldy presented a bill of suspension and interdict against the Company plying between Leith and Newhaven on the one side, and Kirkaldy on the other; and the interdict was granted, and afterwards extended to the Trinity Pier. The Company then attempted to land passengers at Pathhead, which is nearly a quarter of a mile from Kirkaldy, and about a mile from Dysart. A bill of suspension and interdict being also presented against this proceeding, the whole matter was reported by the Lord Ordinary. The Court held,—1. That Kirkaldy had a right of ferry between Leith and Newhaven, limited to four boats, and exclusive of all others; and, 2. That the landing of passengers at Pathhead was an encroachment on that ferry. The bill of suspension as to Kirkaldy was, therefore, passed, and the interdict continued; and that as to Pathhead was likewise passed, and an interdict granted.

**A. MONYPENNY, W. S.—J. YOUNG,—Agents.**

ANN SPEID and HUSBAND, Suspenders.—*Murray—* No. 256.  
*Cunninghame.*

J. WEBSTER and Others, Respondents.—*Cranstoun—*  
*Greenshields.*

*Parent and Child.*—The late Dr. Hunter, by a Dec. 18, 1821.  
settlement, left all his property to Webster and o- SECOND DIVISION.  
thers, trustees, for behoof of two natural daughters Bill-Chamber.  
whom he had by Ann Speid, and named the trustees Lord Meadowbank,  
to be their tutors. The eldest daughter (a pupil) B.  
was, with the approbation of her mother, placed by  
the trustees at a boarding-school. The mother hav-  
ing married, carried off the child clandestinely, but  
was intercepted, and obliged, under a warrant of  
the sheriff of Perthshire, to restore her, 'till par-  
'ties shall be heard on their claims to the cus-  
'tody thereof.' She thereafter applied to the she-  
riff for an order to get delivery of the child; but he  
refused to interpose his authority; on which she for-  
cibly took away the child to her own house in Edin-  
burgh. A warrant having been issued against her  
for restitution, she presented a bill of suspension,  
which the Lord Ordinary refused; and the Court  
(waving the question as to her right to the custody  
of the child, who was said now to be past pupillari-  
ty) held, that as the child had been illegally carried  
off, she must, ante omnia, be replaced in the house  
from which she had been taken; and, therefore, ad-  
hered.\*

J. MACARA, W. S.—THOMSON & FERGUSSON, W. S.—Agents.

\* It is stated in the papers, that in a question between these  
parties, the Court held, (2d December 1820), that the mother

No. 257.

Sir W. C. FAIRLIE, Pursuer.—*Greenshields*.  
NEILSON and FULTON, Defenders.—*Moncreiff—Jameson*.

Dec. 18, 1821.

SECOND DIVISION.  
Lord Cringletie.  
M.K.

*Trustee—Personal Liability—Tack.*—Sir W. C. Fairlie let a farm and coal-work to J. W. and G. Taylors, excluding assignees and subtenants. W. Taylor, by a trust-deed, assigned his interest in the lease to Neilson and Fulton for his creditors. The trustees took possession, and Fairlie thereafter sequestered the machinery and coals for payment of rent; but he did not obtain a warrant of sale. He then raised action against Neilson and Fulton for payment of the rents, as intromitters. Their defences were,—1. That, being trustees, they were only liable to the extent of the funds in their hands. 2. That they were entitled to credit for the sequestered effects. The Lord Ordinary gave an interim-decree against them personally, in respect they ‘were in possession, by assignment from Taylor, of the farm and collieries, and ought to have reaped the profits thereof;’ and repelled the claim for the sequestered effects, excepting as to a certain quantity of coals. The Court adhered, ‘in so far as respects their personal liability for the rents;’ but remitted to the Lord Ordinary to hear farther on the other points of the case.

J. GEMMELL—A. MILLAR, W. S.—Agents.

could not be deprived of the custody of her youngest natural daughter, who was then about six years of age, and who had never been out of her possession.

**E. PATERSON, Suspender.—Clerk—Grahame Bell.**  
**SPARROW & Co., Chargers.—Cockburn—Mailland.**

No. 258.

*Process—Forgery.*—Paterson having been charged on a bond of caution lodged in the Bill-Chamber for Grainger, his brother-in-law, presented, after the lapse of three weeks, a bill of suspension, on the ground, that the charge was vague; but he made no allegation of forgery. This bill being refused, he presented a second bill, alleging generally, for the first time, that his name had been forged by Grainger. The Lord Ordinary having also refused this bill, a petition was presented, in which the allegation was repeated in general terms. This petition was refused without answers; and a second one, containing a specific statement, and referring to an action of reduction, was refused on being advised with answers, as the Court considered that the plea had been brought forward too late to stop the execution of the diligence.

Dec. 20, 1821.

FIRST DIVISION.  
 Bill-Chamber.  
 Lords Hermand  
 and Balmuto.  
 H,

**JOHNSTONE & LITTLE—C. H. MUIRHEAD, W. S.—Agents.**

**R. FRASER.—Clerk—P. Robertson.**  
**Mrs. M'DONALD.—Cranstoun—Skenes.**  
 Competing.

No. 259.

*Clause—Bank of Scotland.*—Mrs. Napier, in 1795, conveyed to trustees, inter alia, 'all shares which 'shall belong to me of the stock of the Bank of Scotland' at the time of her death, to be held for her grand-daughter, Mrs. Fraser, in liferent, excluding the jus mariti, and to her children, in fee, 'in such 'shares as she (Mrs. Fraser) shall direct by a writ-

Dec. 20, 1821.

FIRST DIVISION.  
 Lord Alloway.  
 S.



‘ ing under her hand, at any time in her life.’ Mrs. Fraser’s only daughter entered into a contract of marriage with M’Donald, by which she assigned to him ‘ the sum of £1,200 sterling of the capital stock ‘ of the Bank of Scotland,’ to which she said she had right by Mrs. Napier’s trust-deed. In 1809, Mrs. Fraser, on the narrative that her daughter had, in her marriage-contract, assigned to her husband ‘ £1,200 of the capital stock of the Bank of Scot- ‘ land;’ and that ‘ the said marriage-contract was ex- ‘ ecuted entirely with my consent and approbation, and ‘ that the said sum of £1,200 sterling, therein assign- ‘ ed by her to the said John M’Donald,’ was the pro- portion of Mrs. Napier’s funds which she intended to set aside to her daughter; therefore, she assigned to the spouses, ‘ in implement of the said marriage-con- ‘ tract, the sum of £1,200 sterling,’ ‘ in terms of the ‘ marriage-contract above referred to.’ On the death of Mrs. Fraser, her son alleged in a multiplepinding, that Mrs. M’Donald had right—not to £1,200 sterling of the capital stock of the Bank,—but only to £1,200 out of that stock. This plea the Lord Ordinary re- pelled, and found her entitled to £1,200 sterling of the capital stock, in respect of the evident intention of Mrs. Fraser, and ‘ also in respect that by the 14. Geo. ‘ III, and by many subsequent statutes, the capital of ‘ the bank of Scotland is always designed both in ‘ Scotch and in Sterling money; and the general trans- ‘ actions in the stock of the Company had become so ‘ common in sterling money, according to the prac- ‘ tice of the country, that by the 44. Geo. III, Scotch ‘ money is entirely omitted; and it is enacted, that ‘ the stock of the said Bank of Scotland shall be ‘ reckoned and stated in sterling money of Great

‘ Britain ; and especially in respect that the deed of  
 ‘ corroboration by Mrs. Fraser, corroborating and  
 ‘ confirming the distribution of £1,200 of the capital  
 ‘ stock of the Bank of Scotland, contained in Mrs.  
 ‘ M'Donald's antenuptial contract of marriage, was  
 ‘ not dated until five years after 44. Geo. III.' To  
 this judgment the Court adhered.

J. S. ROBERTSON, W. S.—J. B. FRASER,—Agents.

R. A. OSWALD, Pursuer.—*Clerk—Jardine—Jameson.*

No. 260.

J. OSWALD and Others, Defenders.—*Thomson.*

*Clause—Heir of Entail.*—By an entail under which Mr. Oswald (the pursuer) possessed certain estates, it was declared, ‘ That it shall be in the power of  
 ‘ the several heirs-male, &c. succeeding to the said  
 ‘ lands and estates, notwithstanding the premises, to  
 ‘ grant bonds of provision, in the terms after specified,  
 ‘ to their several lawful younger children who do not  
 ‘ succeed to the said lands, for payment of competent  
 ‘ provisions to them, but for no other use or purpose ;  
 ‘ but which provisions shall only bear interest from  
 ‘ the granter's death; and the principal sums so pro-  
 ‘ vided shall not, in whole, exceed three years free  
 ‘ rent of the said estate,’ &c. And it was farther  
 provided, ‘ that in case any of the said children shall  
 ‘ suffer any of the said provisions to be made in their  
 ‘ favour, or any part thereof, to remain unpaid  
 ‘ for the space of six years after their attaining the  
 ‘ age of twenty-one years respectively, then, and in  
 ‘ that case, not only the fee and property of my said  
 ‘ lands and estate, but also the rents, &c. shall not

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SECOND DIVISION.

Lord Pitmilley.

F.

‘ be liable to, or be affected by any of such provisions, and the same ipso facto shall become void and extinct, so far as exigible out of any part of said entailed estate, or rents, &c. ; reserving always action against the granter, and his heirs-general, and any other estate, real and personal, not subject to this or any subsequent entail to be made by me, or by my appointment.’ Mr. Oswald, on the marriage of his daughter, a younger child, granted to her two bonds of provision under the entail, the one being payable on the day of his death, and the other within twelve months thereafter. He then raised an action of declarator against the heirs-substitute, to have it ascertained,—1. Whether, under the first clause, the bonds vested immediately in his daughter, and would be transmissible to her heirs, although she should predecease him? 2. Whether, under the second clause, the bonds would affect the entailed estate in case he should outlive the majority of his daughter, for such a number of years that the term of payment of the provision should not arrive till more than six years after her majority?

On the report of the Lord Ordinary, the Court decided both points in the affirmative.

J. DUNDAS, W. S.—J. F. GORDON, W. S.—Agents.

No. 261. J. GALBRAITH and his TUTOR, Pursuers.—*Clerk—Rutherford.*

R. GALBRAITH, Defender.—*Baird—Jeffrey.*

Dec. 21, 1821.

SECOND DIVISION.

Lord Pitmilley.

B.

*Title to pursue.*—The estate of Balgair was entailed with a destination containing seven substitutions. The heirs in the two first became extinct,

and the defender was served heir of entail under the third. He was infeft, and in possession. At the distance of some years, an action of reduction of the defender's titles was raised by the pursuer, (a pupil), and his ' administrator in law,' on the ground that he was not an heir of entail; and that all the substitutions were extinguished except the seventh, under which the pursuer had right. The action contained not only reductive, but also declaratory conclusions of the pursuer's immediate right to the estate, and petitory, for the bygone rents. The pursuer produced as his title to pursue, a retour of his service as heir of his father, and an extract retour of his father's service as heir of the seventh nominatim substitute. The administrator produced as his title a retour of his service as tutor at law of the pursuer. It was objected to those titles,—1. That they were not sufficient to support the declaratory and petitory conclusions; and, 2. That the service as tutor did not warrant a party to pursue as administrator in law. The Lord Ordinary sustained ' the title of the ' pursuer and his tutor at law to carry on the action.' But the Court limited this interlocutor, ' to the effect ' of sustaining the pursuer's title to insist in the re- ' ductive conclusions of the libel, reserving consider- ' ation as to all the other parts of the libel.'

A. CRAUFURD, W. S.—J. KERR, W. S.—Agents.

E. BAILLIE, Pursuer.—*Cockburn—Matheson.*

No. 262.

LADY SALTOUN.—*Jeffrey—P. Robertson.*

Dec. 21, 1821.

*Property—River—Jury Court.*—A weir having been erected across the river Ness by Lady Saltoun,

SECOND DIVISION.  
Lord Pitmilley.  
F.

whose property was adjacent, an action of declarator, of removal, and of damages was raised by Baillie, a superior heritor. The grounds of his action were, that the weir was a novum opus,—that Lady Saltoun had no title to make it,—and that it was injurious to his lands, by causing the water to regorge, and to his rights of fishing. Issues were sent to a jury, to ascertain, whether a weir of the same construction had previously existed there? and, if not, what was the amount of the damage sustained? To the first part, the jury returned a negative answer; and found, on the second, 41s. of damages. When the verdict came to be applied, Lady Saltoun objected, that Baillie was not entitled to remove the weir, as this would be an act purely in æmulatione vicini; and offered to instruct that a weir of a different construction had been formerly erected there, for which purpose she prayed for new issues. The Lord Ordinary, however, decerned in terms of the libel; and the Court adhered, ‘without prejudice to any other weir which the petitioner (Lady Saltoun) may have right and title to erect.’

T. MACKENZIE, W. S.—J. B. FRASER,—Agents.

No. 263. R. WADDELL and TRUSTEE, Petitioners.—*Forsyth*.  
J. GRAHAME, Respondent.—*Blackwell*.

Dec. 21, 1821. *Inhibition*.—This was an application for recal of  
SECOND DIVISION. inhibition on various grounds; but the Court granted  
B. it, in respect of caution being offered.

D. FISHER—W. A. MARTIN, W. S.—Agents.

W. BROWN and Others, Petitioners.—*Greenshields* No. 264,  
—*Jeffrey*.

W. JEFFREY and Others, Respondents.—*Forsyth*.

*Execution pending Appeal*.—Brown and others Dec. 21, 1821.  
got decree against Jeffrey (see No. 129) for the principal sum, and expences, part of which had  
been modified, and a part had not. Having asked  
execution pending appeal, Jeffrey objected, that all  
interested were not parties to this application; But  
the Court being satisfied that it was at the instance  
of those in whose favour decree had been pronoun-  
ced, granted warrant for interim execution for the  
principal sum, and for such part of the expences as  
had been modified, and this on caution, in usual form;  
and also, to relieve Jeffrey, &c. of all claims at the  
instance of any other parties having interest.

SECOND DIVISION,  
B.

J. GEMMELL—A. KIDD,—Agents.

LORD SUCCOTH and Others, Petitioners.—*J. Tait* No. 265.  
SIR J. MONTGOMERY and Others, Respondents.—  
*Cuninghame—Rutherford*.

Lord Succoth having purchased an estate belong-  
ing to Mr. Tait, over which the trustees of the Duke  
of Queensberry held an heritable security, but against  
payment of which Mr. Tait had a plea of retention  
in dependence before the Court, prayed for leave to  
consign a part of the price; which the Court granted  
on certain terms agreed on by all concerned.

Dec. 21, 1821.  
SECOND DIVISION,  
B.

W. CLARK, W. S.—H. DONALDSON, W. S.—Agents.

## No. 266.

STIRLING & ROBERTSON.—*Skene*.  
STIRLING & SONS.—*Moncreiff*—*Ivory*.  
Competing.

Dec. 22, 1821.

FIRST DIVISION.

Lord Gillies.

S.

This was a special case, which involved no general point. Stirling and Sons bought certain canal shares from More; and Stirling and Robertson having alleged that they were purchased for their behoof, which was denied, More raised a multiplepinding, in order that the competition might be decided. Being desirous to get payment of the price, the Court authorized More to convey the shares to certain trustees, on payment of the price by Stirling and Robertson; whom failing, by Stirling and Sons, 'for behoof of such of the competing parties as shall be found to have best right to said shares in the course of this process;' and in the event of neither party paying the price within a limited time, empowered him to sell them by public roup. A proposed trust-deed having been lodged in process by Stirling and Robertson, it was objected to by Stirling and Sons, as not in terms of the order of Court. The Lord Ordinary approved of it; but the Court remitted to him to see that it was precisely in terms of their interlocutor,

MACMILLAN & GRANT, W. S.—GIBSON, CHRISTIE, & WARDLAW,  
W. S.—W. & A. G. ELLIS, W. S.—Agents.

## No. 267.

A. M'DOWALL, Suspender.—*Greenshields*.  
A. M'DOWALL and Others, Respondents.—*Baird*.

Dec. 22, 1821.

SECOND DIVISION.

Bill-Chamber.

Lord Meadowbank,

B.

*Process*.—On the 8th of December last, the Court adhered to a judgment of the Lord Ordinary, awarding an interim-decree in favour of the respondents

for a large sum of expenses, (see No. 235). This point of the case was final, and warrant to extract was issued; but it was still competent to reclaim on another branch of the cause relative to interest. The respondents got a caption against the suspender for the process, in order to extract the interim-decree. He presented a bill of suspension, on the ground, that he was still entitled to reclaim on the question of interest, and that the decree had not been read in the minute-book. The Lord Ordinary passed the bill, 'in respect the Court did not dispense with the interlocutor awarding the interim-decree being inserted in the minute-book in ordinary form.' But the Court recalled this interlocutor, and remitted to refuse the bill.

J. WEMYSS, W. S.—J. R. SKINNER, W. S.—Agents.

TRUSTEES of R. HOPE, Pursuers.—*Forsyth*.  
H. STEVENSON, Defender.—*Maidment*.

No 268.

This was an action of count and reckoning, of Dec. 22, 1821.  
which the ultimate decision depended on the report SECOND DIVISION.  
of an accountant. The Lord Ordinary decerned in Lord Pitmilley.  
terms of the report; and the Court adhered, under B.  
reservation of any claims which may arise to the defender from the recovery of certain debts.

D. BROWN, W. S.—C. J. F. ORR, W. S.—Agents.



No. 269.

D. ARNOT, Pursuer,—*Marshall*.  
His CREDITORS, Defenders.—*Jardine*.

Dec. 22, 1821.

SECOND DIVISION.  
M'K.

*Cessio*.—The defenders opposed decree of *cessio bonorum* in favour of Arnot, on fraud and concealment of funds; but the Court being satisfied that there was no evidence of these allegations, decerned in favour of the pursuer.

G. VEITCH, W. S.—J. HERIOT, W. S.—Agents.

No. 270.

D. LIMOND, Suspender.—*Gillies*.  
H. REID, Charger.—*Cuninghame*.

Dec. 22, 1821.

SECOND DIVISION.  
Bill-Chamber.  
Lord Cringletie.  
B.

*Process—Proof—Oath in Supplement*.—Decree was pronounced by an inferior court against Limond, as jointly liable with another for a writer's account. In a bill of suspension he made two objections.—1. No process, in respect the execution of citation was not signed by witnesses; and, 2. That the pursuer's oath in supplement had been allowed and taken, which was incompetent in an action of this kind. The Lord Ordinary refused the bill, 'in respect of the proof and other circumstances of the case, in so far as relative to the merits; and also, in respect that before the sheriff no objection was made to the execution of the summons, but the complainer joined issue with the pursuer, and pleaded peremptory defences, thereby waving any exception to the informality of the action.' And to this judgment the Court adhered, with this qualification, 'that it is unnecessary to determine as to the competency of an oath in supplement in this case.'

J. GEMMELL—HUNTER, CAMPBELL, & CATHCART, W. S.—  
Agents.

G. HUNTER, Suspender.—*Jeffrey—Cockburn—Ivory.* No. 271.  
 A. PONTON, Respondent.—*Solicitor-General—Fergusson.*

*Jurisdiction—Dean of Guild—Contempt of Court.* Dec. 22, 1821.

Hunter applied to the Dean of Guild of Edinburgh to allow him to erect in front of his shop in Princes Street a viranda, supported by two iron-pillars fixed in the middle of the foot pavement; and leave being refused, he presented a bill of advocacy. In the meanwhile, and before any interlocutor on the bill of advocacy was pronounced, he, during the night, put up the viranda. Ponton, the procurator-fiscal, made a complaint against him to the Dean of Guild, concluding for removal and fine. The Dean of Guild, in respect of the contempt of court, ordered the viranda to be forthwith removed, and inflicted a fine. Against the removal a bill of suspension was presented by Hunter, on the grounds,—1. That the Dean of Guild had no jurisdiction over that part of Edinburgh where his property is situated: 2. That he had a right to erect the viranda, as it was within his own property; and, 3. That the refusal of the warrant was not equivalent to an interdict. The Lord Ordinary refused the bill, in respect that Hunter acted in violation of the jurisdiction of the Dean of Guild; and to this judgment the Court adhered.

SECOND DIVISION.

Bill-Chamber.

Lord Meadowbank.

M.K.

P. PHILP—M'RTCHIE & MURRAY, W. S.—Agents.

**No. 272.**     **M. SMEAL and Others, Petitioners.—*Sandford*.**  
**W. WILSON and Others, Respondents.—**

**Dec. 22, 1821.**

**SECOND DIVISION.**

**B.**

*Process—Proof—Witness.*—An action of reduction of a trust-deed on the head of deathbed having been raised against the trustees by Smeal and others, they prayed for warrant to examine one of the trustees, who had advanced to a great age, the deposition to lie in retentis. The summons had been called in Court, and inrolled for debate. Warrant was granted, upon condition that a regular discharge, freeing the trustee of all the consequences of the action, should be produced before the examination took place.

**J. B. WATT,—Agent.**

**No. 273.**     **A. GLEN, Pursuer.—*Brownlee*.**  
**Major T. DUNDAS, Defender.—*Jardine*.**

**Jan. 15, 1822.**

**FIRST DIVISION.**

**Lord Alloway.**

**D.**

*Pactum Illicitum.*—Glen raised an ordinary action against Major Dundas, as representing his father, General Dundas, for the arrears on a bond of annuity granted by the latter. The defence was pactum illicitum; the bond having been given as a bribe to secure the vote of the pursuer's brother for Sir Thomas, afterwards Lord Dundas, one of the candidates at a contested election of Stirlingshire in 1790. By that bond General Dundas bound himself and his heirs, 'in consideration of a certain sum of money advanced and paid by Alexander Glen, to pay to the said Alexander Glen £150 sterling yearly during all the days of his life, aye and until I, or my fore-saids, obtain for the said Alexander Glen the clothing of my own regiment, or any other regi-

'tinent on his majesty's service, in which case this obligation shall be null and void.' The bond was executed, three days prior to the election, at the house of the candidate;—the first term of payment was two days after the election;—the annuity had never been paid by General Dundas except for two years, (during which time the validity of the election depended before a committee of the House of Commons), after which it was paid by Lord Dundas's agents till 1808. The pursuer could not condescend on having given any specific value for the bond, but merely alleged 'that he had delivered into the hands of General Dundas a very considerable sum of money.' He admitted that there was no entry relative to it in his books; and that when his estates had been sequestrated, he had not given up the bond to his creditors. The Lord Ordinary reported the case; and the Court, being satisfied that the bond had been granted for an illegal purpose, assoilzied the defender.

DUNCAN & LANG—H. J. ROLLO, W. S.—Agents.

KEMP'S TRUSTEES, Pursuers.—*Clerk—M'Farlane.* No. 274.  
J. URE, Defender.—*Cockburn—J. Wilson.*

*Catholic Creditor.*—Ure held an heritable security for £400, with a power of sale, over two tenements, one belonging to John Christie, and the other to William Christie. Kemp's trustees thereafter obtained a security for £500 over John's property. Of this they gave notice to Ure; and when he intimated his intention to exercise his power of sale over John's subjects, they requested him to sell William's, which

Jan. 15, 1822.

FIRST DIVISION.

Lord Gillies.

D.

were unencumbered with any other debt. Instead of doing so, he permitted William to dispose of his tenement to a purchaser, and then proceeded to sell John's by public roup. The trustees appeared, and offered to pay off Ure's debt on the same terms as the buyer was required by the articles of roup to pay the price. But he refused to accept of this offer; and the price for which the property was sold was insufficient to satisfy both debts. In a conjoined action of reduction of the sale, raised by the trustees, and of multiplepoinding, by Ure, relative to the balance in his hands, the Lord Ordinary found him liable for the debt due to the trustees, 'in respect Mr. Ure did not accept of the offer made at the sale of John Christie's subjects by A. Kemp's trustees, to pay his, Mr. Ure's, debt.' And the Court adhered.

Tob & WRIGHT, W. S.—A. WISHART, W. S.—Agents.

No. 275. J. & R. TENNENT and Others, Pursuers.—*Moncreiff*  
—*Jardine—Cockburn—Blackwell.*

C. TENNENT & Co., Defenders.—*Jeffrey—More—*  
*Grahame—A. Dunlop, jun.*

Jan. 15, 1822. *Jury Court—Process.*—J. and R. Tennent and others raised an action against C. Tennent and Co. for the removal of a very extensive manufactory of oxygenated muriatic acid, in the vicinity of Glasgow, as a nuisance, or otherwise to pay a certain sum of damages. The Lord Ordinary ordered a condescendence and answers, and a debate took place on the relevancy.

SECOND DIVISION.  
Lord Pitmilley.  
M'K.

The pursuers moved the Lord Ordinary to remit the case forthwith to the Jury Court, which was resisted by the defenders, on the grounds,—1. Of acquiescence, which they alleged involved a question of law: 2. That the pursuers ought, in the first place, to declare whether they meant to insist in their conclusion for removal, or in the alternative one for damages; and, 3. That there was a defence of *lis alibi pendens*, which ought to be disposed of. The Lord Ordinary repelled the two first objections, but ordered minutes on the plea of *lis alibi*. Against this judgment a representation was received, answers given in, and an interlocutor refusing it pronounced, finding, that as the process on which the plea of *lis alibi* rested had now been advocated *ob contingentiam*, the order for minutes was unnecessary. The Lord Ordinary then remitted the case to the Jury Court. A representation was given in, which was objected to as incompetent, and parties were heard on the objection. The Lord Ordinary, ‘ in respect  
‘ that by the interlocutor of the 31st of January last, two of the objections urged by the defenders to a remit were, for reasons stated in  
‘ the interlocutor, repelled, and in respect a representation for the defenders, containing argument  
‘ on the above-mentioned points, was received, and  
‘ having been followed with answers, was refused by  
‘ interlocutor of the 19th of May last, finds, that the  
‘ defenders were, by the rules and practice of the  
‘ Court, entitled to take the opinion of the Inner  
‘ House on the points of relevancy which the Lord  
‘ Ordinary had thus disposed of; and, therefore, that  
‘ the interlocutor represented against, which remits  
‘ *de plano* to the Jury Court, and thus, if regularly

‘ pronounced, would preclude any representation or  
 ‘ petition, ought not to have been pronounced in the  
 ‘ then state of the process; for those reasons recalls  
 ‘ the interlocutor represented against, in so far as it  
 ‘ remits the process to the Jury Court, but adheres  
 ‘ to it quoad ultra; and of new finds, that none of the  
 ‘ objections stated by the defenders to a remit to the  
 ‘ Jury Court are well founded; and that if this inter-  
 ‘ locutor shall be adhered to, or shall become final,  
 ‘ the process will be remitted accordingly.’ Both  
 parties presented petitions against this interlocutor.  
 The defenders maintained, that the case ought not to  
 be sent per aversionem to the Jury Court, but that  
 the relevancy of the facts alleged ought first to be  
 decided; while the pursuers prayed for a remit de  
 plano to the Jury Court. The Court refused the  
 pursuers petition, and recalled the interlocutor so far  
 as complained of by the defenders; found it was  
 expedient, before remitting the case to the Jury  
 Court, to adjust issues in this Court; and, therefore,  
 ordered condescendences.

TENNENT & LYON, W. S.—W. & A. G. ELLIS, W. S.—Agents.

No. 276.

W. HARLEY, Suspender.—*Bell—More.*

A. CAMPBELL, Charger.—*Cranstoun—Dunlop.*

Jan. 16, 1822.

FIRST DIVISION.

Lord Gillies.

H.

*Clause.*—Campbell feued to Harley certain por-  
 tions of ground, each consisting of a specific number  
 of square yards, ‘ or thereby, and in which measure-  
 ‘ ment the said William Harley acquiesces, be the  
 ‘ same more or less, bounded on the north by the  
 ‘ centre of the Sauchiehall road.’ For each square

yard an annual feu-duty was payable. Harley having resisted payment of the feu-duty from Martinmas 1818 to Whitsunday 1819, decree was pronounced against him in the inferior court. In a suspension of a charge on it, he alleged that he was entitled to a deduction of the feu-duty corresponding to the part of the Sauchiehall road, which he said had been included in the measurement by mistake. The Lord Ordinary repelled the reasons of suspension, in respect by the feu-contracts 'it appears that 'it was from no mistake on either side, but by 'the deliberate agreement of parties, that, in measuring the grounds feued, the centre of the Sauchiehall road was held to be one of the boundaries thereof; and that agreeably to the measurement thus made, the amount of the stipulated feu-duty for each square yard was regulated; and that a different amount would, of course, have been fixed, if a different description of the ground, and a different mode of measurement, had been adopted.' To this interlocutor the Court adhered.

WM. RENVY, W. S.—G. DUNLOP, W. S.—*Agents.*

G. SANDERS and Others, Petitioners.—*Blackwell.*

No. 277.

W. MONRO, Respondent.—*Clephane.*

*Bankrupt—Trustee.*—Monro, a writer in Portree, having been confirmed trustee on the sequestrated estate of Ferguson, a merchant in the Isle of Skye, a requisition was soon thereafter served on him by more than one-fourth of the creditors in value to call a meeting for his removal. He refused to do so; on which the creditors presented an application to the

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SECOND DIVISION.

B.



Court to ordain him to call the meeting. The ground on which this was asked was, that it would be more expedient that the trustee should be resident in Greenock or Glasgow, where the majority of the creditors lived, than in Skye. The Court refused two petitions, without answers.

R. BURN, W. S.—W. DALLAS, W. S.—Agents.

No. 278.

A. MACDOWALL, Pursuer.—*Baird*.

A. MACDOWALL, Defender.—*Bell—Greenshields*.

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SECOND DIVISION.

Lord Pitmilley.

B.

*Agent—Expences.*—The case (No. 235) between these parties having been remitted to the Lord Ordinary, he decerned against the defender for additional expences, and allowed decree to go out and be extracted in name of the pursuer's agent. The defender alleging that the agent had been previously paid, and in order to exhaust the case with the view to an appeal, presented a petition to the Court against this judgment. But the part of the decree as to the agent being passed from, the Court refused the petition.

J. R. SKINNER, W. S.—J. WEMYSS, W. S.—Agents.

No. 279.

J. BROWN, Suspender.—*Boswell*.

W. ALLAN, Charger.—*Jardine*.

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SECOND DIVISION.

Lord Cringletie.

M'K.

*Sale—Joint Purchase.*—This was a special case, the decision of which depended on the purport of various letters. Gault, after having bought goods from Allan, became bankrupt, and thereupon the latter raised an action against Brown for the price, on the ground that he was a joint purchaser. The inferior

court decreed against him; but the Lord Ordinary held in a suspension, that Brown was merely a purchaser from Gault to the extent of one-half, and found him liable to Allan to that extent, in consequence of the terms of a letter. To this judgment the Court adhered, on condition that Allan should find security to relieve Brown of any claim against him by Gault.

J. M'GREGOR—D. MURRAY, W. S.—Agents.

J. TAIT, Petitioner.—*M. A. Fletcher.*

No. 280.

*Record—Mistake in recording Deed.*—An instrument of sasine taken on a bond and disposition in security bore, that 'the lands are redeemable upon repayment of the foresaid principal sum of £100 sterling, and interest.' In recording this deed, a mistake was committed, by which the lands were declared to be redeemable 'on repayment of the foresaid principal sum of £1,000 and interest.' A petition for correcting the record having been presented, the Court granted the prayer, under reservation of the rights of third parties.

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D.

J. A. CAMPBELL, W. S.—Agent.

J. SLATER, Pursuer.—*Gordon.*  
HENDERSON and SCOTT, Defenders.—*Cockburn—  
Rutherford.*

No. 281.

*Mandate—Agent—Writer.*—A letter, inclosing a caption at the instance of Slater against R. Cliffe, was

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FIRST DIVISION.  
Lord Gillies.  
H.

sent through the medium of Slater's agent at Annan, addressed to Scott, a writer and messenger in Langholm, Scott was in partnership with Henderson, who was a writer, but not a messenger, and by him the letter was opened in Scott's absence. In the letter it was said,— ' I feel this to be a very delicate piece of business ; and in place of putting the diligence into the hands of a messenger here to go over and execute it, from the knowledge I have of your integrity and prudence, have preferred sending it with an express to you, in the hope that, through your good offices, the debt may be recovered without recurring to extremities ; and this I rely on your endeavours to effect.'—' The caption has been taken out and transmitted, that it may be immediately executed by taking Mr. Cliffe into custody, and thereby endeavouring to obtain full payment of the debt, If the demonstration of taking him to jail should not produce the money, which Mr. Slater believes he has in his possession, then if Mr. Cliffe shall pay the £100 down, and give security for payment of the balance at three months, with interest and costs, by a good bill, he may be allowed to settle in that way. If the removal of Mr. Cliffe cannot produce any cash, it would be desirable to get a good man along with him in a bill for the whole debt at three months. But if nothing can be done in either of these ways, then Mr. Cliffe must, of necessity, be incarcerated ; for in one or other of the ways above pointed out it is necessary that the debt be forthwith settled. I need hardly add, that in such a case as much delicacy as possible should be used in the execution, as

‘ the privacy of the proceedings may be more likely to insure success of the measure than the reverse ; and relying entirely on your prudence in the business, I remain,’ &c. Henderson had immediately an interview with Cliffe, and allowed him to go to Carlisle to find a cautioner for the debt. He returned without success in a few days to Langholm. During this interval, and while Slater was ignorant of the manner in which Cliffe had been permitted to go to England, he sent a letter to him, agreeing to delay the execution of the diligence for a short time. Thereafter Cliffe becoming bankrupt, Slater raised action against Scott and Henderson for not executing the instructions in the above letter, Scott having been absent during these proceedings, the Lord Ordinary assolizied him, ‘ in respect that nothing is stated regarding his conduct that can make him liable in the present action ;’ but he found, ‘ that, in compliance with the mandate and instructions, it was the duty of the defender, Henderson, when he accepted of the said mandate, to cause Mr. Cliffe to be instantly apprehended : that Henderson by entering into a treaty with Cliffe, without causing him to be taken into custody, and allowing him during the dependence of that treaty to proceed to England, directly violated the instructions contained in the foresaid letter : that the subsequent letter by the pursuer to Cliffe having been written by the former after he found that Cliffe had reached England, and when he had no opportunity of knowing of the proceedings above mentioned, can afford no defence to Henderson against the present action.’ To this judgment the Court adhered.

J. B. BRODIE, W. S.—THOS. SMALL, W. S.—Agents.

No. 282.

J. ROYDS, Pursuer.—*Walker.*FRASER'S TRUSTEES, Defenders.—*Cockburn—Mail-land.*

Jan. 17, 1822.

FIRST DIVISION.

Lord Gillies.

D.

*Society—Title to pursue.*—This was an action by Royds, the surviving partner of Ross and Company, an army-agent, for clothing furnished to the Inverness-shire local militia on the order of Fraser of Lovat, who had been colonel of the regiment, and had as such drawn the government allowances. The defences by the trustees were,—1. That Royds had no title to pursue; and, 2. That there was no evidence of the furnishing. But the Lord Ordinary and the Court being satisfied on both these points, decerned in terms of the libel.

WALKER, RICHARDSON, & MELVILLE, W. S.—Æ. M'BEAN, W. S.  
Agents.

No. 283.

MRS. EASTON, Pursuer.—*Cranstoun—More.*NEWLANDS' TRUSTEES, Defenders.—*Erskine—Pyper.*

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SECOND DIVISION.

Lord Pitmilley.

B.

*Prescription—Equitable Debt.*—Margaret Newlands was maintained by Mr. and Mrs. Easton in their house from 1796 to 1810. During this period she was in indigent circumstances, but was major. In 1815, she succeeded to a considerable fortune, which she conveyed to trustees for special purposes, and particularly to pay all debts for which she was 'bound in law, or equity, or in conscience.' She addressed a letter to the trustees in 1817, acknowledging that she had been supported by Easton from 1796 to 1810; stating, that she was desirous to give his widow some recompense, and consenting 'to her

‘ being allowed at the rate of £20 per annum for the  
‘ said fourteen years, in full of board, lodging, and  
‘ clothes.’ The trustees refused to obey this order ;  
and, after Newlands’ death, an action was raised a-  
gainst them for the amount. The action was found-  
ed on an alleged verbal agreement in 1796 by New-  
lands to pay board,—on the letter, as instructing the  
fact of residence, and of the amount due,—and on  
the clause in the trust-deed, as obliging the trustees  
to pay the debt. In defence the trustees pleaded  
prescription ; and the Lord Ordinary found that the  
claim was prescribed ; that the letter did not inter-  
rupt the prescription ; for ‘ although it proved the  
‘ undisputed fact of the residence of fourteen years  
‘ without any board having been paid, it does not  
‘ admit an agreement having been made at the com-  
‘ mencement of that period to pay for board, but rather  
‘ implies that no such agreement had been entered  
‘ into or thought of at the time :’ that it could  
not create a debt against the trust-estate, as New-  
lands had been previously denuded, and had only  
obliged her trustees to pay debts formerly contract-  
ed ; and he, therefore, assolizied the trustees. But  
the Court altered this interlocutor, and decerned in  
terms of the libel, with interest from the date of the  
letter.

It was observed, that although there was originally no  
legal, yet there was a natural debt by Newlands,—that  
it was sufficiently constituted by the letter,—and being  
a debt due in equity and conscience, the trustees were  
bound by the terms of the trust to pay it.

A. SMITH, W. S.—SCOTT & FINLAY, W. S.—Agents.

No. 284.

S. M'COLL, Pursuer.—*Keay*.  
J. CAMPBELL, Defender.—*Sandford*.

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SECOND DIVISION.  
Lord Cringletie.  
F.

*Process—Mandate.*—The Court refused to write on a petition by Campbell in an action by M'Coll against him, in respect he was out of the country, and no mandatory had been sisted.

MACHILLAN & GRANT, W. S.—MARTIN & STEVENSON, W. S.—  
*Agents*.

No. 285.

J. M'DONALD, Pursuer.—*Greenshields*.  
A. M'NIE, Defender.—*Forsyth*.

Jan. 17, 1822.

SECOND DIVISION.  
Lord Cringletie.  
M'K.

An heritable bond for £200 was granted by M'Donald to M'Nie, on which infestment was taken. Sometime thereafter M'Donald raised action against M'Nie, on the allegation that he had only received from him £82, and concluded for payment of the balance, and damages for not paying it at the stipulated term. M'Nie's defence was, that, in point of fact, it had never been the intention of the parties that a larger sum than £82 should be advanced on the bond; and that he was willing to discharge it on payment of the sum already lent. The Lord Ordinary and the Court assoilzied the defender.

W. DICKSON, W. S.—D. FISHER,—*Agents*.

Mrs. CRAW, Pursuer.—*Murray—M'Lean.*  
 TRUSTEES of the WIDOWS FUND of the WRITERS to  
 the SIGNET, Defenders.—*Moncreiff—Hope.*

No. 286.

*Statute—Writers to the Signet.*—By statutes in Jan. 17, 1822.  
 1808 and 1818, the Writers to the Signet were em- SECOND DIVISION.  
 powered to create, by contribution, a fund for provi- Lord Pitmilley.  
 sions to their widows. The fund is appropriated B.  
 solely to the widows of the contributors, and is sup-  
 ported from two sources:—1. From an annual rate  
 payable both by married and unmarried members;  
 and, 2. From two taxes,—one the marriage, and the  
 other the equalizing tax, which are paid at the date  
 of a contributor's marriage. In regard to these taxes  
 it is enacted, 'That in case any contributor to the  
 ' fund shall die leaving his marriage or equalizing  
 ' tax unpaid for three months after the term of pay-  
 ' ment thereof, or his annual rates unpaid for six or  
 ' more years, his widow shall forfeit the benefit of  
 ' the scheme.'

The pursuer claimed the benefit of the fund as the  
 widow of Craw, an annual contributor. After Craw's  
 death, she had (in 1816) obtained decree of declarator  
 of marriage against him, by habit and repute from  
 1814. Craw had never paid the marriage and equal-  
 izing taxes, and the trustees, therefore, resisted her  
 claim. She alleged, that this was a *casus improvisus*  
 in the statutes; and that although the three months  
 were elapsed from the date of the marriage, she was  
 entitled, on paying the taxes, to the privileges of the  
 fund. Having raised an action against the trustees, in  
 order to be ranked as a widow on the fund, the Lord  
 Ordinary assoilzied them; and the Court adhered.

GEO. GORDON—JAS. STUART, W. S.—Agents.



No. 287.

R. HUNTER, Pursuer.—*Cranstoun—Jameson.*  
 Mrs. CARSEWELL, Defender.—*Moncreiff—Gillies.*

Jan. 17, 1822.

SECOND DIVISION.  
 Lord Pitmilley.  
 B.

*Sale—Condition.*—Hunter agreed, by the following missive, to sell to Mrs. Carsewell property adjacent to the shore of Greenock.—‘19th October 1815. As I have agreed to sell you the ground belonging to me, situated on the shore, and to the west of the harbour of Greenock, together with the whole houses and sheds erected thereon, and having received your letter obliging you to pay the stipulated price of £3,150 sterling at the term of Whitsunday next, I, therefore, hereby oblige myself, my heirs and successors, against the said term of Whitsunday, to deliver to you a formal disposition to said subjects, with every necessary clause, to be holden, &c. The term of your entry to be at Whitsunday next: and I am at the said term to produce a legal progress, and to clear the subjects of all encumbrances.’ A counter-missive was granted by Mrs. Carsewell. By an after arrangement, £2,500 of the price was paid up on Hunter’s promissory-note, and possession of a part of the property given before Whitsunday. Immediately on getting possession, Mrs. Carsewell proceeded to erect certain buildings, and a coterminous proprietor obtained an interdict against her, on the allegation that she had encroached on his boundaries. As the interdict continued at Whitsunday, she refused to accept of the property, and afterwards, by a charge on the promissory-note, got repayment of the £2,500. The interdict was subsequently recalled, and Hunter raised an action for implement of the missive.—The Lord Ordinary found, ‘that at the term of Whit-

'sunday 1816, when the defender ought, in terms of  
'the missive of sale, to have obtained entry to the  
'subjects which the pursuer agreed to sell her, there  
'was a subsisting interdict at the instance of A.  
'M'Arthur against the pursuer, which put it out of  
'the power of the pursuer to implement his bargain  
'with the defender, by giving her possession of the  
'whole subject at the stipulated term of Whitsun-  
'day: that the interdict was recalled some months  
'thereafter; but that the litigation with M'Arthur  
'continued, and was not ended till the month of  
'June 1819, during the whole of which period it  
'was, of course, uncertain whether the pursuer had  
'right to that part of the subject which was claimed  
'by M'Arthur, and without which the property  
'would not have served the uses for which it was  
'intended by the defender when she agreed to pur-  
'chase it: that at Whitsunday 1816, the defender  
'intimated to the pursuer, by a formal instrument  
'of protest, that she held the bargain at an end, in  
'consequence of the pursuer's inability to put her in  
'possession of the whole of the property at the sti-  
'pulated term: that it is established that immedi-  
'ate possession at Whitsunday 1816 was necessary  
'for the defender, in order to enable her to carry  
'into effect those views on account of which she  
'entered into the transaction with the pursuer; and  
'that she could not be obliged to wait the result of  
'a protracted and doubtful litigation between the  
'pursuer and A. M'Arthur.' On these grounds his  
Lordship assoilzied the defender. To this judgment  
the Court (by a majority) adhered.

It was agreed on the Bench, that the views of Mrs. Carse-  
well in purchasing the property could not be taken into

consideration. But the majority held, that as Hunter was bound to give possession at Whitsunday 1816, clear of all encumbrances, the subsistence of the interdict at that time (although unfounded) was sufficient to entitle Mrs. Carsewell to refuse implement of her part of the agreement.

HORNE & EASTON, W. S.—W. CRAIG, W. S.—W. SMITH,—  
Agents.

**No. 288.** Mrs. A. S. WILLET, Petitioner.—*Cranstoun—Cunninghame.*

Mrs. E. Ross, Respondent.—*Forsyth.*

Jan. 18, 1822. *Ranking and Sale—Sequestration of Land Estate.*

**FIRST DIVISION.**  
S.

—In 1783, George Ross entailed the estate of Cromarty in favour of a series of substitutes, of whom Alexander Ross was the first. The entailor having died, A. Ross succeeded to the estate. He granted bond to Willet in 1796 for £20,000. The entail was not recorded till 1803, and within a year thereafter A. Ross became bankrupt. A process of ranking and sale of Cromarty was then raised by a creditor of A. Ross; and in 1804, Mrs. Willet, as the representative of Willet, got decree of adjudication of the estate, reserving objections contra executionem. She was afterwards allowed, on the death of the creditor, to carry on the process of ranking and sale in her own name; and, at a considerable distance of time, she applied to the Court to sequester the estate, and name a judicial factor. This was opposed by the widow of A. Ross, who had been infest posterior to the date of the ranking and sale, in a locality under the entail, on the grounds,—1. That the debt was otherwise secured: 2. That Mrs. Willet's title was liable

to various objections: 3. That it was yet undecided whether the entailed estate could be adjudged: 4. That there was no process of mails and duties, nor of pointing of the ground; and, 5. That, at all events, the locality-lands could not be sequestrated. But the Court sequestrated the whole estate.

YOUNG, AYTOUN, & RUTHERFURD, W. S.—DALLAS & INNES,  
W. S.—Agents.

J. MACARA, Suspender.—*Gillies*.  
T. WATSON, Charger.—*Bruce*.

No. 289.

*Bill of Exchange—Vitiation.*—Macara presented a bill of suspension of a charge on a bill drawn by him, on the ground of vitiation, alleging that it was originally addressed to and accepted by A. Laidlaw; whereas there had been subsequently added, without his knowledge, the address to, and acceptance of another party, with the addition of the words, ‘conjunctly and severally;’ and the indorsation, which was specially to William Watson, had been altered from William to Thomas Watson. The Lord Ordinary refused the bill; but the Court (of consent) passed it.

Jan. 18, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Cringletie.

B.

J. MACARA, W. S.—TAIT & BRUCE, W. S.—Agents.

J. COBBAN and Others, Advocators.—*Lumsden*.  
Mrs. and A. SCOTT, Respondents.—*Baird*.

No. 290.

*Corporation.*—This was a question relative to the right of the respondents to exercise the trade of wrights and cabinet-makers within the town of Aberdeen, without entering with the corporation. The

Jan. 18, 1822.

SECOND DIVISION.

Bill-Chamber.

The Lord Meadowbank.

B.

Lord Ordinary had refused a bill of advocacy presented by Cobban and others, as representing the corporation, against a judgment by the magistrates of Aberdeen ; but the Court (of consent) passed it.

J. MORRISON, W. S.—J. R. SKINNER, W. S.—Agents.

No. 291. J. DUNDAS, Petitioner.—*Dalyell—Moncreiff—W. R. Robinson.*

W. LAWRIE and Others, Respondents.—*Clerk—Forsyth—Sandford.*

Jan. 19, 1822.

FIRST DIVISION.  
H.

*Bankrupt—Trustee—Discharge.*—Dundas was, in 1805, appointed trustee on the sequestrated estate of the Merchant Banking Company of Stirling, including seven different estates. Having, in 1820, applied to be exonerated, Lawrie and others, creditors of that company, objected, on the ground, that he had not complied with the statutes 35. and 54. Geo. III, as,—1. He had not made up inventories : 2. Nor kept regular books : 3. That his accounts were not regularly audited by the commissioners : 4. That he had allowed some of the outstanding debts to be lost : 5. That he did not consign the sums recovered in the bank, as required by the statute, but had retained them in his hands, or lent them to his friends : 6. That he had made allowances to the bankrupts unwarranted by the statutes ; and, 7. That he had been guilty of various other acts of mismanagement. The greater number of these accusations were denied, but some of them were admitted ; and his defence was, that, in a sequestration of such an involved and peculiar nature, a rigid observance of the statute was

not only impossible, but, even if it had been attempted, must have been followed with detrimental consequences to the interests of the creditors. The Court refused the discharge in hoc statu.

Observed on the Bench, that although it was impossible for Mr. Dundas, in such a sequestration, to follow the rules of the statute in every respect, yet he was bound to do so wherever this was in his power.

ROBINSON & PATERSON, W. S.—D. FISHER,—Agents.

W. URE, Pursuer.—*John Tait.*

No. 292.

TAYLOR and GARDENER, Respondents.—*J. Watson.*

*Cessio Bonorum.*—Decree of cessio bonorum was here opposed on the ground of fraud; but the Court seeing no evidence of this, and being satisfied that the pursuer was entitled to the benefit of the cessio, decerned in his favour.

JAN. 19, 1822.

FIRST DIVISION.  
H.

TOD & WRIGHT, W. S.—THOS. DARLING,—Agents.

J. TAYLOR, Suspender.—*Moncreiff—Henderson.*

No 293.

NEILSON & FULTON and Others, Chargers.—*Clerk—Jameson.*

*Suspension—Submission—Process.*—A submission entered into between Taylor, on the one hand, and Neilson and Fulton, trustees of William Taylor, on the other, to settle all their claims hinc inde, and with power to the arbiters to pronounce interim-decrees. After an interim-decree, ordaining Taylor to relieve certain lands of two heritable bonds, had been issued, the submission was allowed to

JAN. 19, 1822.

SECOND DIVISION.  
Bill-Chamber.  
Lord Cringletie.  
M'K.

expire without final decree being pronounced. A charge having been given to Taylor on the interim-decree, he presented a bill of suspension, on the grounds,—1. That prior to its date he had paid off the one bond, (of which he produced a discharge): 2. That the chargers were indebted to him in a larger sum than that which was contained in the other bond; and, 3. That the interim-decree was null, as the submission had expired before final decree-arbitral had been given forth. The Lord Ordinary, on advising with the Court, (11th July 1818), passed the bill without caution as to the first bond; ‘but, quoad  
 ‘ ultra, passes the bill upon caution to be found  
 ‘ within six weeks from this date: and in the event  
 ‘ of no caution being found within the said period,  
 ‘ prohibits the clerk from issuing a certificate of no  
 ‘ caution until a bond of caution shall be lodged by  
 ‘ the chargers, that they will repay the sum for which  
 ‘ caution is required, in the event the same shall be  
 ‘ paid to them in consequence of the diligence being  
 ‘ carried into effect, and its being afterwards found  
 ‘ that such sums were not due.’ To this judgment the Court adhered, on advising two petitions and answers.\*

Their Lordships were in general of opinion, that as a special power was conferred on the arbiters to pronounce interim-decrees, the one under suspension was unobjectionable in point of law; but on this point no decision was pronounced.

W. GARDNER, W. S.—A. MILLAR, W. S.—Agents.

\* The first of these petitions was objected to as incompetent. The six weeks expired on the 22d August, and no caution had been found by Taylor. A bond was lodged by the chargers on the 31st, which, however, was not signed by them all. The clerk issued his  
 certificate

LORD A. HAMILTON, Pursuer.—*Clerk—Cranstoun—* No. 294.

*Jeffrey—Moncreiff—Cockburn.*

D. STEVENSON, Defender.—*More—M'Niell.*

*Jury Court—Statute 59. Geo. III, c. 35.—* Lord A. Jan. 19, 1822.

Hamilton raised an action against Stevenson, as the printer and publisher of a newspaper called the Beacon.

SECOND DIVISION.

Lord Pitmilly.

M'K.

The conclusions of the summons were, that the defender should be ordained 'to make payment to the pursuer of the sum of £5,000 sterling, in pame of damages, for the gross injury he has already sustained or might have sustained in consequence of the wanton, malignant, unjust, and calumnious charges, &c., printed and published in manner above mentioned;' and he concluded also for expences. The pursuer having moved the Lord Ordinary to remit the case to the Jury Court, the defender objected that the action was incompetent; for as the conclusions of the summons were alternative, he was entitled to hold that the pursuer rested on the last of them, in which damages were claimed not for an actual, but only for a possible injury. The pursuer did not reply; and the Lord Ordinary pronounced the usual interlocutor,—'Remits this process to the Jury Court;' and it was, accordingly, transmitted to that Court. A representation having been lodged, and the Lord Ordinary having refused to write on it, a petition was presented to the Court, urging the same plea which had been stated to the Lord Ordinary.

certificate of no caution by Taylor on the 3d September, but no execution took place; and the petition was marked and boxed on the 5th, which was the box-day. It was alleged, that after the certificate had been issued it was not competent to petition. But the Court, on advising a report from the depute-clerk of the bills, and minutes by the parties, repelled the objection.



The Court appointed the petition to be answered as to the competency; and afterwards unanimously refused the petition as incompetent, the proceedings complained of being warranted by the act of parliament.\*

Three of their Lordships were of opinion, that if the action had been utterly incompetent, a petition might have been received: but the other Judges expressed great doubts whether they had powers, even in such a case, to review an order, remitting the case to the Jury Court.

R. ARTOUN, W. S.—R. S. WILSON, W. S.—Agents.

No. 295. J. R. STODDART, Complainer.—*Cockburn*—P. ROBERTSON.

G. ROBERTSON, W. S.—*Maitland*.

and

R. DUNCAN, Respondents.—*Moncreiff*—*Skene*.

Jan. 22, 1822.

FIRST DIVISION.

H.

*Process*.—Duncan borrowed a process at the instance of Stoddart against him, in name of G. Robertson, writer to the signet, with whom he had lately been an apprentice. After a caption had been issued against both Duncan and Robertson, and a search had been made for the former, Stoddart presented a petition and complaint against them, praying that they should be ordained to return the process, and subjected in fine or other punishment. Robertson denied that he had authorized the process to be borrowed in his name: and Duncan pleaded,—1. That a petition and complaint was incompetent after a caption had been issued: \* and, 2. That he had never refused to

\* Pleadet at the Bar,—not in the papers.

return the process, but had been prevented from doing so by illness. The Court 'sustained the complaint; found 'that the conduct of the said Robert Duncan was 'incorrect, and, therefore, amerciate him in a fine of '20s. to the poor; also, find the said Robert Duncan 'liable to the complainer in £10 sterling of expences, and to the said George Robertson in four 'guineas of expences.' And to this interlocutor, on advising a petition, they adhered.

M'QUEEN & M'INTOSH, W. S.—GEORGE ROBERTSON, W. S.—  
CAMPBELL & BURNSIDE, W. S.—Agents.

R. DUNCAN, Petitioner.—*Moncreiff—Skene—Gillies.* No. 296.  
J. R. STODDART, Respondent.—*Cockburn—P. Robertson,*

*Inhibition.*—Mutual actions of damages having been raised by Duncan and Stoddart, the latter executed letters of inhibition against the former on the dependence. The conclusion of Stoddart's action was for £6,000; but Duncan having applied for recall of the inhibition, the Court granted the prayer of his petition, on finding caution for £100.

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FIRST DIVISION.  
H.

CAMPBELL & BURNSIDE, W. S.—M'QUEEN & M'INTOSH, W. S.—  
Agents.

J. BARBOUR, Pursuer.—*More.* No. 297.  
MRS. NEWALL, Defender.—*Maitland.*

*Bill of Exchange—Protest.*—Barbour raised action against Mrs. Newall, as representing her husband, on three bills, of which he was drawer and indorser.

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FIRST DIVISION.  
Lord Gillies.  
S.

The bills (it was said) had been protested in 1811, in evidence of which a single instrument of protest was produced, which included not only the three bills, but several others. It was objected, that this did not afford legal evidence of the protest; and that the instrument was null on the stamp acts. The inferior court, 'in respect the bills libelled on do not appear to have been protested in terms of law,' assoilzied the defender; and, in an advocacy, the Lord Ordinary adhered. Barbour reclaimed; and having produced separate instruments applicable to each of the bills, lately obtained from the notary who had protested them, the Court 'recalled the interlocutors reclaimed against, and remitted to the Lord Ordinary to hear parties on the case as it now stands; the petitioner always making previous payment of the expences of the proceedings hitherto incurred.'

W. DALRYMPLE—T. GRIERSON, W. S.—Agents.

No. 298.

D. FRASER and his FATHER, Pursuers.—*Sandford*.  
A. DUNLOP and R. MONTGOMERIE, Defenders.—*Cunninghame*.

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Lord Gillies.

H.

*Reparation—Implied Obligation.*—An action was instituted by D. Fraser, (a child of four years of age), with concurrence of his father, against Dunlop, a brewer, and Montgomerie, his servant, for reparation of a severe injury he had suffered on the public road, from having been run over by a horse and cart, belonging to Dunlop, and at that time employed in his business under the charge of Montgomerie. The summons libelled,—‘ That

‘ the pursuer’s misfortune arose from the carelessness and inattention of the said Robert Montgomerie in driving his cart upon the footpath, where the pursuer was when he was so rode down, and for whose inattention and carelessness the said Archibald Dunlop is responsible, and liable to indemnify the said pursuer for loss and damage sustained by him.’ The Lord Ordinary found the action relevant against the servant, but reported the case as to its relevancy against the master. The Court found,—‘ That the libel, as laid, in this case, is relevant to infer a claim of damages against both parties.’

WM. JAMIESON, W. S.—J. TWEEDIE, W. S.—Agents,

KIRK-SESSION of DALMELLINGTON,—Pursuers.—  
*Hutcheson.*

KIRK-SESSION of TROQUEER.—*Gillies.*  
and

KIRK-SESSION of RUTHWELL, Defenders.—*Henderson.*

No. 299.

*Poor—Aliment.*—Joseph Carruthers, a travelling packman, married Margaret Goldie, a native of the parish of Dalmellington, by whom he had five children. He deserted his wife, who returned with her family to Dalmellington. Having been supported for some time by that parish, an action of relief was raised by the Kirk-Session against the parish of Troqueer, as the place of Carruthers’ last legal settlement. Thereafter a supplementary action was brought against the parish of Ruthwell, as the place of his birth, and one was instituted by Ruthwell against

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FIRST DIVISION,  
Lord Alloway,  
S.

Troqueer, to be relieved in the event of being found liable to Dalmellington. These actions were conjoined. The defence by the parish of Ruthwell was,—That Carruthers was the illegitimate son of two persons born and residing in the neighbouring parish of Mousewald,—that the mother had come to Ruthwell, to be there delivered in secret,—that the child, on the next day after its birth, was carried out of the parish, and the mother left it immediately on her recovery. It was, therefore, contended, that mere birth was not sufficient to found a claim against Ruthwell; and that the burden must be laid on Troqueer. The Lord Ordinary ordered a condescendence before answer by Ruthwell, as to what was averred relative to Troqueer, ‘in respect it is not denied that the pauper in question was born in the parish of Ruthwell, and it has not been shewn that he acquired any legal settlement in the parish of Dalmellington; and the regular course seems, therefore, to be, to make the parish where the pauper was born relieve themselves, by shewing that a legal settlement had been acquired elsewhere.’ His Lordship then reported the case, with the condescendence and answers; and the Court ‘sustained the defences pleaded for the Heritors and Kirk-Session of Ruthwell, in the supplementary action against them at the instance of the Heritors and Kirk-Session of Dalmellington, and remitted to the Lord Ordinary to proceed farther in the other conjoined process.’

T. GRIFFSON, W. S.—J. THORBURN—R. AYTOUN, W. S.—  
Agents,

J. and R. WATSON, Petitioners.—*Cockburn—Rutherford.*

No. 300.

W. JOHNSTONE, Respondent.—*Skene.*

*Execution pending Appeal.*—Watson having obtained decree against Johnstone on a guarantee of certain bills, prayed for interim-execution pending an appeal by Johnstone to the House of Lords. This was opposed, on the ground, that it had been discovered since the appeal, that Watsons had discharged one of the principal obligants on the bills prior to a judicial offer made by them in the course of the action, to assign to Johnstone the dividend due out of that obligant's bankrupt-estate. But the Court being satisfied that Watsons were still in a condition to implement their offer, granted warrant for interim-execution in common form.

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FIRST DIVISION.  
D.

W. Renny, W. S.—T. JOHNSTONE,—Agents.

Sir M. S. STEWART and Others, Pursuers.—*Cranston—Cuninghame.*

No. 301.

The MAGISTRATES of PAISLEY, Defenders.—*MacKenzie—Sir W. Hamilton,*

*Burgh—Member of Parliament.*—The Magistrates of Paisley, in the year 1665, obtained a crown-charter of the territory and superiority of the burgh, with very extensive privileges and jurisdiction. The burghage-lands were rated in the cess-books of the county at £1,077 Scots; and the Magistrates, in order to create freehold qualifications, obtained decrees of division from the commissioners of supply, allo-

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Lord Alloway,  
S.

cating the cess equally on each acre of the burgage-territory. They then proceeded to dispose privately of liferent-rights of superiority; but before the sale was completed, Sir M. S. Stewart and others, burghesses and feuars of land holding of the burgh, presented a bill of suspension and interdict, and afterwards brought an action of reduction, on the following grounds.—1. That the Magistrates had no power to multiply superiors over those holding lands of the burgh. 2. That the sale attempted by them was an act of maladministration. 3. That it would be destructive of the privileges of the burgh, and of the jurisdiction of the Magistrates. 4. That if the superiority of the burgh was a disposable subject, and if any particular emergency made a sale of it necessary, it should be sold by public roup. 5. That the proposed method of dividing the valued rent was incompetent and irregular. The Court, on advising informations for the parties, ordered by the Lord Ordinary, ‘grant the interdict as prayed for; suspend the letters simpliciter, and reduce, decern, and declare in terms of the summons of reduction.’

The majority of their Lordships rested their opinions chiefly on the three first grounds.

W. PATRICK, W. S.—J. GIBSON, W. S.—Agents.

No. 302.

D. LOUDON, Petitioner.—*Brownlee*.

A. TURNER, Respondent.—*Baird—Jardine*.

Jan. 22, 1822.

SECOND DIVISION.

F.

*Bankrupt*.—In this case no general point occurred. It was a petition and complaint by Loudon, who had been elected trustee on a sequestrated estate in room of a former trustee, against Turner, who had previous-

ly acted as law-agent, for retaining the minutes and sederunt-book of the creditors ; and praying for confirmation. The documents having been produced, he was confirmed trustee, and Turner subjected in expences.

G. LANG—W. WADDELL, W. S.—Agents.

J. Low, Petitioner.—*Bell—Cranstoun—Robertson.* No. 803.  
W. ANDERSON, Respondent.—*Skene.*

*Bankrupt—Trustee.*—A petition and complaint was presented by Low, a creditor, against Anderson, trustee on A. Smith's sequestrated estate, resting on fourteen different charges of violation of duty, and concluding for removal. But the Court found, that the charges were shewn either to be unfounded, or were not instructed, with the exception that certain occasional meetings had not been advertised in the Gazette. As this exception, however, was not made a distinct charge, and in the circumstances was unimportant, they dismissed the complaint ; but in respect of the omission as to the advertisement of the meetings, found expences were due, subject to modification.

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M'K.

CAMPBELL & ARNOTT, W. S.—GARDNER & BURNETT, W. S.—  
Agents.



No. 304. **A. ANDERSON and Others, Suspenders.**—*Moncreiff*—*D. M'Farlane.*

**P. WOOD and Others, Chargers.**—*Forsyth*—*H. J. Robertson.*

Jan. 22, 1822.

SECOND DIVISION.  
Lord Glenlee.  
B.

*Expences.*—The Court, after pronouncing judgment on the merits of the case, (see No. 84), allowed the suspenders, before answer on the expences, to give in a minute as to the particulars of an offer made by them to the chargers. On advising a minute and answers, the Court found expences due, subject to modification.

A. STEELE, W. S.—T. JOHNSTONE,—Agents.

No. 305. **R. HILL, Pursuer.**—*Moncreiff*—*Maidment.*  
**S. COOPER, Defender.**—*Jardine.*

Jan. 22, 1822.

SECOND DIVISION.  
Lord Cringletie.  
F.

*Expences.*—This was a question of expences, the decision of which depended on the conduct of parties. The Lord Ordinary considered that the whole litigation had been caused by Hill not having libelled his ground of action with sufficient distinctness; and, therefore, while he decerned on the merits in his favour, found him liable to the defender in expences. But the Court, seeing that there had been faults on both sides, recalled this interlocutor, and found expences due to neither party.

R. HILL, W. S.—W. DICKSON, W. S.—Agents.

L. PHILLIPS and J. HOW, (ASSIGNEES OF CRAWFORD & WATSON).—*Jeffrey—Monteith.* No. 306.

J. AITCHESON, Defender.—*Cranstoun—More.*

Crawford and Watson having given certain bills to Aitcheson, an action was raised by their assignees against him to account for the proceeds, on the ground, that he held them for their behoof. His defence was, that he had received the bills as managing partner of a company of which Crawford and Watson were members; and that they were indebted to the company in a larger sum. The inferior court decerned against Aitcheson, and the Lord Ordinary adhered; but the Court, after a report from an accountant, assolizied him.

Jan. 24, 1822.

FIRST DIVISION.

Lord Gillies.

S.

G. NAPIER—R. HENDERSON,—Agents.

WHYT'S TRUSTEES, Pursuers.—*Baird—Moncreiff.* No. 307.  
R. ROBERTSON, Defender.—*Blackwell—J. Miller,*  
*jun.*

*Process.*—After a petition by the pursuers against the Lord Ordinary's judgment, sustaining a plea of prescription, had been refused, a second one was appointed to be answered. A few days previous to advising the case, the Court 'allowed both parties ' mutually to make production of written evidence, ' and adjust a joint appendix to the petition and answers, for the consideration of the Court.' Against this order Robertson gave in a petition, on the grounds, that the pursuers were not now entitled to make any new productions, and that the proposed evidence was

Jan. 24, 1822:

SECOND DIVISION.

Lord Cringletie.

M'K.

incompetent. But the Court refused the petition as premature; in respect there had been no decision ' upon the competency or incompetency of the documents referred to ;' and found Robertson liable in expences.

M. PATTISON—A. ROBERTSON, W. S.—Agents.

No. 308. A. CAMPBELL and his CURATORS, Pursuers and Suspenders.—*Clerk—M. Farlane.*  
D. TURNER, Defender and Changer.—*Greenshields—Jeffrey.*

Jan. 24, 1822. *Minor—Reduction—Fraud—Process.*—Campbell, a minor, and his curators, suspended a charge on two bills accepted by him,—one for £150, and the other for £30,—which had been indorsed to Turner; and also, raised reduction of them, on the grounds,—1. That the bills were null, as they had been granted by a minor under curators, without their consent : 2. That the bills were obtained from the minor through facility and circumvention ; and, 3. That Turner was not a bona fide onerous indorsee.

The Lord Ordinary found, ' that the bills in question, which are now in the hands of an indorsee, ' whose right to them is presumed in law to be onerous, are not liable to reduction on the ground of ' minority and lesion, in respect the acceptor is proved ' to have betaken himself to trade or occupation, in ' the course of which he made bargains, and frequently granted bills, (and this even with the knowledge of his curators, or some of them), which were ' received and discounted at the banks and other ' places : that neither are these bills reducible on the

' ground of the facility of the acceptor, in respect  
 ' there is no proof or reason to presume that the de-  
 ' fender was guilty of any fraud or improper practice  
 ' in obtaining the pursuer's acceptance, or had any  
 ' concern in procuring the bills from the pursuer;' and  
 his Lordship, therefore, assolizied the defender, and  
 found the letters orderly proceeded. Against this  
 interlocutor a petition was refused. In consequence  
 of a second petition, the defender was appointed to  
 produce his books, and to be judicially examined  
 in presence; and, before advising his declaration,  
 the pursuer was allowed to give in an addition-  
 al petition, which he, accordingly, did. The Court  
 then reduced the £30 bill, and assolizied the de-  
 fender quoad ultra. No notice whatever was taken  
 in this interlocutor of the one pronounced by the Lord  
 Ordinary. A petition having been presented by the  
 pursuer, it was objected to as incompetent; but the  
 Court holding that the last interlocutor was a new  
 one in the cause, and that there had not been two  
 consecutive judgments of the Inner House, found the  
 petition competent, but refused it on the merits.

TOD & WRIGHT, W. S.—J. GEMMELL,—Agents.

R. BROWN and Others, Petitioners.—*Cranstoun*—No: 309.  
*Baird.*

A. WIGHT, Respondent.—*Clerk*—*Maconochie.*

*Bankrupt—Discharge—Statute 54. Geo. III, c. Jan. 25, 1822.*  
 137—*Process.*—On the 26th of May, a petition by  
 Wight for a discharge under the bankrupt statute, FIRST DIVISION.  
 was appointed to be intimated; and, on the 6th of Lord Hermand.  
 July, the Court remitted to any of the Lords Or- D.

dinary of the First Division, officiating in the Bill-Chamber during the vacation, to grant the discharge, if he should see fit. The discharge was granted on the 14th September. Brown and others presented a petition to the Court for recal of the discharge, on the grounds,—1. That no list of the statutory number of concurring creditors had been lodged until the 20th of July; and that, thereafter, it had been withdrawn, and a new one given in within twenty-four hours before the discharge was granted; and, 2. That there was not the legal concurrence. But the Court being satisfied that the original list had been withdrawn merely to correct an error; that it was laid before the Lord Ordinary prior to the discharge being granted, and that there was the requisite concurrence, refused the petition; and afterwards, on a second petition, adhered.\*

R. HENDERSON—D. M'LEAN, W. S.—Agents.

No. 310.

J. MILNE, Petitioner.—*Jardine*.

J. IMLAY, Respondent.—*P. Robertson*.

Jan. 25, 1822.

FIRST DIVISION.

D.

*Execution pending Appeal—Process.—George*

Milne having raised an action of declarator against John Imlay, to have it found that he had now the exclusive right in a joint lease; ' and that the said

\* The second petition was objected to as incompetent, in respect that the Lord Ordinary had granted the discharge, as vested with the powers of the Inner House; and as a petition against his judgment had been refused, there had been two consecutive interlocutors of the Inner House. The Court ordered the petition to be answered both on the competency and merits. The objection was waved by Wight at the advising; but several of their Lordships expressed an opinion that it was well founded.

' John Imlay has no right or interest whatever therein, and should be prohibited from farther interfering therewith,' he obtained final decree in terms of the libel. The benefit of the lease, and of this decree, was assigned to James Milne by his brother, George, the pursuer, who soon thereafter died. Imlay having appealed to the House of Lords, obtained a warrant of service of the appeal on James Milne, as heir of his brother. A petition having been in the meantime presented to the Court by James Milne, as '*assignee* of the late George Milne,' praying for interim-execution, by ordaining Imlay 'to remove instantly from the foresaid farm;' the Court granted warrant accordingly, on caution, in common form. Against this judgment Imlay reclaimed, on the grounds, *inter alia*, —1. That execution was asked not by the representative but by the assignee of George Milne, which was incompetent; and, 2. That the original decree contained no order to remove; and, therefore, no warrant to that effect could be granted on an application for interim-execution. This petition was objected to as incompetent; but while the Court sustained the competency, they refused it on the merits. Against this judgment Imlay having appealed, James Milne presented a petition to the House of Lords, praying that the appeal should be dismissed as incompetent. But the House of Lords ordered, 'that the said appeal is competent, and that the prayer of the said petition be not complied with.'\*

\* It is mentioned in one of Milne's papers, that the Lord Chancellor stated, in reference to his petition, that 'if the petitioner claimed execution under a judgment not pleaded in the cause then under appeal, I think the Court below did wrong in granting him execution under the statute. We are, therefore, bound to consider the second appeal as an appeal in a new suit ;

James Milne thereupon, as 'heir-general of the late 'George Milne,' applied to the Court to grant interim-execution; and he produced as his title a service as heir of his brother, cum beneficio inventarii. The Court having awarded execution, he gave Imlay a charge, in which Milne was designed assignee of his brother. Against this charge a bill of suspension was offered by Imlay, on the ground, that there was an appeal depending as to his title to pursue in that character; but the Lord Ordinary refused it. While an order of the Court to answer a petition against this interlocutor was current, a new charge was given by Milne, as heir of his brother. Imlay then presented a new bill of suspension, in respect that the charge was incompetent, while the validity of the former was sub judice; that the decree charged on did not warrant a charge in the character of heir, but only as assignee, and that he was not the general representative of G. Milne, being only his heir cum beneficio inventarii. Although in the extracted decree Milne was designed assignee, yet it contained the authority of the Court to allow execution at his instance as heir. The Lord Ordinary and the Court refused this bill, and also the petition which had been ordered to be answered. The process was immediately borrowed by Imlay; and a caption having been threatened, he offered a bill of suspension, on the ground, that he was entitled to twenty days to reclaim. The Lord

'for as this House cannot read the assignation on hearing the first appeal, we must sustain the second, as it may turn out that the assignation is clogged with conditions that do not entitle him to all the benefits pronounced in favour of his brother. He must, therefore, go to the Court below, and apply for possession in the only character in which this Court can recognise him, on hearing the original appeal.'

Ordinary, after advising with the Court, refused the bill.

JOHN MORRISON, W. S.—T. LAWSON,—Agents.

A. SMITH, (GORDON'S TRUSTEE), Suspender.—*Forsyth* No. 311.  
—*Jeffrey*.

D. STEWART, (WATERS' TRUSTEE), Charger.—*Keay*  
—*Rutherford*.

*Trustee—Personal Liability—Expences.*—By a decree-arbitral, Smith, a professional accountant, and trustee on Gordon's estate, was ordained to pay a debt to Stewart, in so far as he had trust-funds. He suspended a charge, on the ground, that he had not funds, and carried on a long litigation, of which this allegation formed the basis. But, by the report of an accountant, it was proved that he had sufficient funds to pay the debt. The Court, in these circumstances, decerned against him personally for the expences of process.

Jan. 25, 1822.

SECOND DIVISION.

Lord Craigie.

F.

W. RITCHIE—D. STEWART,—Agents,

J. BELL, Petitioner.—*Skene*.

No. 312.

J. and D. STEWART, Respondents.—*Cranstoun*—*Keay*.

*Process—Summary Complaint.*—A summary complaint was, in November 1820, presented by Bell, a writer in Inverary, against John and Duncan Stewarts, concluding against them, conjunctly and severally, for damages and expences. The ground of complaint against John Stewart was, that, in 1813, he had

Jan. 26, 1822.

SECOND DIVISION.

F.



improperly attempted to obtain from certain clients of Bell a disclamation of an action depending before the Court of Session at their instance ; and his charge against Duncan Stewart was, that he had sanctioned certain expressions injurious to him in a pleading in the above action in 1814, and had repeated them in another pleading in 1819. The action was still going on before the Lord Ordinary when this complaint was presented. The Court held,—1. That the complaint was not competent in a summary shape against J. Stewart, as he was not a party to the process ; and that there was no relevant charge against him. 2. That it was competent against Duncan, in respect he was a party in a depending process ; but that the expressions used in 1819, (for which alone he was responsible), were pertinent to the cause ; and, at all events, the complaint was brought too late. It was, therefore, dismissed.

D. STEWART—D. M'LEAN, W. S.—Agents.

No. 313. J. M'LAREN and A. M'ISAAC, Suspenders.—*Blackwell—Rollo.*

LEITH BANKING COMPANY, Chargers.—*Bell—P. F. Tytler.*

Jan. 26, 1822.

SECOND DIVISION.  
Bill-Chamber.  
Lord Cringletie.  
M'K.

*Bill of Exchange—Suspension.*—M'Laren and M'Isaac discounted a bill with Tainsh, agent for the Leith Bank at Crieff. About five months after the bill fell due Tainsh died, at which time the bill was in his repositories. The Bank having taken possession of this bill, charged M'Laren and M'Isaac to pay it. They presented a bill of suspension, alleging that the bill was paid, and referring to an entry to that

effect in a pass-book kept between them and Tainsh. The Lord Ordinary refused the bill; but the Court passed it on caution, in order farther to investigate the circumstances.

H. J. ROLLO, W. S.—J. TUTTLE, W. S.—Agents.

C. STEWART and Others, Petitioners.—*Cunninghame*. No. 314.  
H. STRONG, Respondent.—*Rutherford*.

*Process*.—On the 21st October 1821, the Lord Ordinary passed a bill of suspension at the instance of Strong against Stewart and others. The letters not having been expedite, a petition was presented by Stewart and others on the 26th January, complaining of the delay, and praying warrant to remit to the Lord Ordinary to discuss the reasons of suspension on the bill summarily. The Court refused the petition 'as irregular,' and found expences due.

Jan. 29, 1822.

FIRST DIVISION.  
Bill-Chamber.  
Lord Gillies.

J. G. HOPKIRK, W. S.—WM. RENNY, W. S.—Agents.

J. VANS AGNEW, Petitioner.—*P. Robertson*. No. 315.  
T. GRIERSON, W. S., Respondent.—*A. Bell*.

*Appeal*.—In this case, interim-decree having been pronounced against Agnew, (see No. 225), he prayed the Court to allow him to appeal; but this was refused.

Jan. 29, 1822.

FIRST DIVISION.  
S.

W. POLLOCK—T. GRIERSON, W. S.—Agents.

No. 316.

SIR J. H. DALRYMPLE, Pursuer.—*Murray*.  
 Dr. LAUDER and J. RUTHERFORD, Defenders.—*Jardine*.

Jan. 29, 1822.

FIRST DIVISION.

Lord Alloway.

D.

*Tack*.—Lauder and Rutherford obtained a lease for a period of years from Sir J. H. Dalrymple, and were bound to plant a certain number of acres with trees. The object of this action was to get implement of the obligation, and damages for the loss arising from the neglect of it. The case was altogether of a special nature; and the Lord Ordinary, after remitting to a person of skill to inspect the land, and to ascertain the amount of the damages, decerned in terms of his report; and the Court adhered.

R. J. DUNDAS, C. S.—TOD & WRIGHT, W. S.—Agents.

No. 317. D. M'LACHLAN, (EXECUTOR OF ALVES), Pursuer.—*McNiell*.

C. CAMPBELL & Co., Defenders.—*Cunninghame—Walker*.

Jan. 29, 1822.

SECOND DIVISION.

Lord Cringletie.

F.

*Proof*.—M'Lachlan, as executor of Alves, raised action against Campbell and Company, who pleaded compensation of part of the debt, on the allegation that Alves owed them the price of certain goods furnished by their agent and consignee, Mr. Mewburn, in Demerara. The sole evidence adduced of this was the testimony of Mewburn. The Lord Ordinary repelled the plea, in respect that 'he cannot sustain the unsupported oath of Mr. Mewburn, the correspondent of the defenders, and the person directly liable to them for those goods;' and he refused to allow a farther proof, on

account of the unprecedented delay of the defenders.  
The Court refused a petition, without answers.

R. M'KENZIE, W. S.—CAMPBELL & CLASON, W. S.—Agents.

W. BROWN, Advocate.—*Greenshields.*

No. 318.

J. CHRYSTAL, Respondent.—*Ivory.*

*Triennial Prescription—Advocation.*—The inferior court, in an action by Chrystal against Brown for payment of a law-account due by his father, beginning in 1798 and ending in 1806, repelled a defence on the triennial prescription, in respect of a letter produced by Chrystal, bearing the signature (but said not to be holograph) of Brown's father, dated in 1812, in which the constitution and resting owing were admitted. The Lord Ordinary refused a bill of advocacy; but the Court having indicated a wish to see an answer, the respondent consented that the bill should be passed.

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SECOND DIVISION.

Bill-Chamber.

Lord Glenlee.

F.

It was objected that the advocacy was incompetent, as the principal sum was only £10 : 1 : 3; but the libel concluded for interest, which raised the debt to £16, 11s. 10d. The Court disregarded the objection.

N. W. ROBERTSON—RAMSAY & INRIE,—Agents.

A. THOMSON and Others, Suspenders.—*Clerk—A. Murray.*

No. 319.

BANK OF SCOTLAND, Charger.—*Cockburn—Walker.*

*Cautioner—Bank Agent.*—Thomson and others, in 1808, granted a bond of caution to the Bank of Scotland for the due and faithful administration of the

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SECOND DIVISION.

Lord Pitmilley.

B.

office of agents at Perth by J. and W. Marshall; and, in particular, that they should account for all monies intrusted to them on behoof of the Bank,—for all loss arising on bills discounted by them,—and that they should not act as private bankers. But the extent of the responsibility of the cautioners was limited to £10,000. It was also provided, that the Bank was to be entitled, on the termination of the agency, to take summary possession of the contents of the repositories; and that in no case were the cautioners to compete with the Bank on the estate of the agents. No specific rules were laid down in the bond by which the conduct of the agents was to be governed, this being regulated by instructions issued by the Bank. The agents having incurred an arrear of £40,000, the Bank, in August 1811, got from them a promissory-note, payable at Martinmas thereafter, but reserving all other securities. At the same time, J. Marshall granted to the Bank an heritable bond, on which infestment was immediately taken, for the above sum. The agency was put an end to in May 1812; and the Bank, after giving notice to the cautioners to attend to their interests, took possession of the whole funds in the repositories. A charge having been given to the cautioners to pay the £10,000 contained in their bond, they suspended it, in respect,—1. That the bond was illegal; for while the cautioners were subjected to great risks, they received no pecuniary consideration; and, 2. That the Bank had lost recourse,—*First*, By having entirely neglected the interest of the cautioners; and, in particular, in so far as the Bank was aware that the agents were grossly misconducting the business, and giving extravagant accommodation to mercantile houses, (in one of which

W. Marshall was a partner), and yet gave no notice of this to the cautioners; and, *secondly*, By taking the above promissory-note, and giving time to the agents, without the consent of the cautioners. The Lord Ordinary repelled the reasons of suspension, 'in respect of the terms of the bond, in which the suspenders became obligants, and in respect the extent of the discounts and other matters in the management of the Perth agency, which are complained of by the suspenders, were not owing to any fault or omission on the part of the Directors, but entirely to the agents themselves, for whom the suspenders are responsible; and in respect it is not established, after all the investigation which has taken place, that the Directors of the Bank, after the agency of W. and J. Marshall at Perth had ceased, took any steps which can injure the suspenders right of relief, or which could be held to free the suspenders from their obligation, or which were not sanctioned or authorized by the bond.' To this judgment the Court (by a majority) adhered.

THOMSON & FERGUSSON, W. S.—H. DAVIDSON, W. S.—Agents.

J. HARVEY, Suspender.—*Cranstoun—Jameson.*  
 J. HAMILTON (TRUSTEE ON R. WILSON'S Sequestrated Estate), Charger.—*Clerk—Cunninghame.*  
 P. WILSON'S TRUSTEES.—*Cockburn—D. M'Farlane.*  
 P. WILSON, and his TUTOR ad Litem, Compearers.—*Fullerton.*

No. 320.

*Prescription—Service and Confirmation—Res Judicata.*—John Wilson, who was fully vested in the lands of West Bowfield, holding of Stewart of Ard-  
 Jan. 29, 1822.  
 SECOND DIVISION.  
 Lord Pitmilley.  
 B.

gowan, disposed them, in 1704, to his son, Patrick, (the *first*), and thereafter died. Patrick was base infest, and died, leaving a daughter, Janet. She passed over her father, and obtained a precept of clare constat from the superior, as heiress of her grandfather, John. On this precept she was infest in 1721. By contract of marriage, in 1731, with Henry Wilson, she disposed the lands to him, with procuratory and precept. He was infest on the precept in 1735, and died without making his right public. Of this marriage there was a son, Patrick, (the *second*), who, after the death of his parents, possessed the lands on apparençy. In 1762, he entered into a contract of marriage, by which he disposed in favour of the heir-male of the marriage one-half of all the heritable property which should belong to him; and, in 1793, he got a precept of clare constat for infesting himself as heir of his mother, Janet, after having, by a deed of settlement, disposed all property to which he had right, including West Bowfield, to trustees for special purposes, whom he also named to be tutors of his children. Patrick died, leaving a son, Robert. Soon after his father's death, Robert's estates were sequestrated under the bankrupt-act, and adjudged to Hamilton as his trustee. In order to complete his right to the lands, Hamilton caused two titles to be made up in Robert's person.—1. He was served heir of provision of his grandfather, Henry; and a charter of confirmation of Janet's precept in favour of Henry, and of his infestment, was obtained;—the precept of clare constat for infesting Patrick as heir of Janet was reduced; and during the dependence of the reduction, one was got in favour of Robert, as heir of Henry's investiture. 2. Robert was served heir-male

of provision under the contract of marriage of his father. On Robert's death, a deed of concert and agreement was entered into between the trustees of Patrick, (the *second*), and Hamilton, the trustee of Robert, under which the lands were sold to Harvey. Robert had left a minor son, Patrick, (the *third*), who was not a party to the agreement; and Harvey being doubtful of the validity of the title offered to him, suspended a threatened charge.

In reference to his grounds of suspension the Lord Ordinary found,—(1.) That the infestment in favour  
' of Janet Wilson in 1721, proceeding on a precept  
' of clare constat granted to her by the superior, as  
' heir of John Wilson, her grandfather, having been  
' followed by long possession, was secured by pre-  
' scription, and established in her person a valid  
' title to the lands of West Bowfield, notwith-  
' standing of the infestment in 1704 in favour of  
' the first Patrick Wilson, on which no other titles  
' followed, and which was extinguished by prescrip-  
' tion, and cut off by the subsequent titles in favour  
' of Janet Wilson, and prescription following on  
' them. (2.) That the said Janet Wilson having, in  
' 1731, conveyed these lands to her husband, Henry  
' Wilson, by a contract of marriage which contained  
' both procuratory and precept; and he having been  
' infest on the precept in 1735, and his grandson,  
' Robert Wilson, having been served heir to him, and  
' thus having acquired right to the unexecuted procur-  
' atory; but in place of expediting a charter of resigna-  
' tion, having obtained a charter of confirmation of  
' his grandfather's infestment from the superior, a-  
' long with a precept of clare constat in his own fa-  
' vour as heir of his grandfather, in which he was in-



‘ feft, a valid title to the lands was thus established  
‘ in favour of Robert Wilson. (3.) That the charger,  
‘ as trustee on the sequestrated estate of Robert  
‘ Wilson, having, before the date of the precept of  
‘ clare constat in favour of Robert, commenced an  
‘ action of reduction of the precept of clare constat  
‘ 1798, in favour of the second Patrick Wilson, who  
‘ was the father of Robert, as heir of his mother,  
‘ Janet Wilson; which titles had been erroneously  
‘ made up by the second Patrick Wilson after his  
‘ mother was denuded by the contract of marriage  
‘ in 1781, and infeftment 1735, was entitled to in-  
‘ sist in and follow out the said action of reduction,  
‘ and, during the dependence of it, to complete the  
‘ title of Robert Wilson, by obtaining a confirmation  
‘ and precept of clare constat in his favour from the  
‘ superior, and taking infeftment on it: that the pre-  
‘ cept of clare constat and infeftment in 1798 were,  
‘ accordingly, reduced and set aside in an action in  
‘ which appearance was made for the trustees and  
‘ tutors of the third Patrick Wilson;’—on these  
grounds his Lordship repelled the reasons of suspen-  
sion.

Harvey having reclaimed, the Court (although the trustees of Patrick (*second*) had made appearance) ordered Patrick Wilson, the minor, to be called, and named a tutor ad litem to him. On advising a minute by him, the Court, while it held that the decree of reduction was not *res judicata* against the minor, adhered to the Lord Ordinary’s interlocutor.

CAMPBELL & CLASON, W. S.—J. SMYTH, W. S.—J. BLAIR, W. S.  
—RUSSELL, ANDERSON, & TOD, W. S.—Agents.

J. SCOTT, STEWARTS TRUSTEE, Suspender.—*Cockburn* No. 321.

—*Rutherford.*

M'QUEEN & M'INTOSH, Chargers.—*Moncreiff*—  
*Buchanan.*

*Agent and Client—Transaction.*—M'Queen and Jan. 31, 1822.

M'Intosh were employed as the factors and law-  
agents of C. and D. Stewart from 1814, and became  
creditors to a large amount for advances and law-  
charges. The whole accounts were submitted by  
the parties to a professional accountant, and, on his  
report, were docketed as correct by Stewarts, who  
granted a formal discharge of the intromissions of  
M'Queen and M'Intosh as factors, and an acknow-  
ledgment of the justice of their claims. Stewarts then  
conveyed their estates to M'Queen and M'Intosh in  
trust for their creditors. In 1821, Stewarts executed  
a new trust in favour of Scott, an accountant, who,  
along with them, raised an action against M'Queen  
and M'Intosh, on an alleged obligation to denude  
in favour of Scott, and to hold count and reckoning  
from 1814. This action was settled by a regular  
transaction,—a deed of agreement, obligation, and  
discharge having been executed under the advice of  
counsel, by which it was agreed that the trust should  
be devolved on Scott; that M'Queen and M'Intosh  
should have a preference over the trust-funds for  
payment of the sums due to them, on their allowing  
a deduction from their business-accounts; and Scott  
and Stewarts declared themselves satisfied with their  
whole intromissions and claims, both as trustees and  
agents. After various sums had been paid under  
this agreement, Scott and Stewarts presented a bill  
of suspension of a threatened charge for the last

FIRST DIVISION.

Bill-Chamber.

Lord Meadowbank.

S.

instalment of the debt, on the ground, that the law-accounts of M'Queen and M'Intosh had never been submitted to the inspection of any professional person : that they were never audited or taxed : that the Stewarts had no means of challenging and detecting improper and illegal charges ; that they had no assistance whatever ; but, dealing with their own agent, they were obliged, under threats of diligence, to admit them as correct. The Lord Ordinary appointed the bill to be answered on caution ; but, instead of this, consignation was offered to the amount of the debt ; and the bill was afterwards refused, in respect the same was appointed to be answered on caution, which had not been found. The Court, however, being satisfied that the grounds of suspension were unfounded, and, particularly, that there had been a final transaction between the parties, adhered to the interlocutor of the Lord Ordinary refusing the bill, and considered it unnecessary to decide whether it was competent to offer consignation of the debt, where the bill had been previously ordered to be seen on caution..

Æ. M'BEAN, W. S.—M'QUEEN & M'INTOSH, W. S.—Agents.

No. 322. TRUSTEES of W. FORBES, Pursuers.—*Cranstoun—Moncreiff—Alison.*

TUTORS of J. LIVINGSTONE, Defenders.—*Dean of Faculty Ross—Clerk—Thomson—M'Niell.*

Jan. 31, 1822. *Prescription.*—Mutual actions of declarator were  
 SECOND DIVISION. brought, in 1809, by Forbes and Livingstone, relative  
 Lord Craigie.  
 F.

to the coal in the estate of Parkhall, which forms part of the barony of Almond. The leading action was at the instance of Forbes. His titles stood thus.

—The Earls of Callender were proprietors of the barony of Almond, of which they had granted various feus, under reservation of the coal. The barony, with the other estates of James Earl of Callender, was forfeited in 1716, and was soon thereafter bought by the York Buildings Company, by whom it was sold to Forbes, including the reserved right to the coal.

Livingstone's titles were these.—In the seventeenth century, the lands, in which the coals in dispute were situated, had been feued by the Earls of Callender to Livingstone's predecessors, with parts and pertinents, including iron-stone, but under reservation of the coal. Livingstone, however, in 1716, got a charter of his lands, including Parkhall, from the Barons of Exchequer, to be held of the crown, in virtue of the Clan act. The reservation of the coals was not inserted in this charter.

In defence against Forbes's action, Livingstone pleaded,—1. That the charter 1716, with possession of the surface of the lands since that time, gave him right to the coals by prescription. In relation to this point the Lord Ordinary found, that by this charter, ' though conceived in unlimited terms, no ' greater or more extensive right to the coal or lime- ' stone could be granted, or was intended to be ' granted, than had been formerly competent to (Li- ' vingstone's) predecessors, the only purpose of such ' charter being to enable his predecessor to hold of ' the crown :—' That in virtue of the reservation of ' the coal and limestone in the original feu-rights,

‘ these minerals continued a part of the estate, belonging to the granters as much as if no feu-rights had been granted ; and, consequently, that the property thereof could not be lost by the negative prescription ;’ but found, that the charter 1716 afforded a good prescriptive title. To this judgment the Court, after a hearing in presence, adhered.\* Livingstone then pleaded,—2. That he had actually possessed the coal for more than 40 years under this charter. On the proof which was adduced two questions arose.—1. Whether the workings which he had proved were in a part of the lands in question ? and, 2. Whether these workings were sufficient to constitute a prescriptive possession ? The Court decided the first point in the affirmative : and as to the second, they (by a majority) held, that as it was established that there had been workings prior to 1755, and beyond memory, (although it was not ascertained by whom),—that in 1755 coal was worked in the same place for several months,—that in 1785 these workings were renewed for five years, and with the full knowledge of Forbes ;—this was a sufficient possession to support a prescriptive title to the coal within Livingstone’s lands ; and, therefore, assolizied him from the action by Forbes’s trustees, and decerned in terms of his declarator.

The Judges in the majority considered that it was sufficient that a series of workings was proved during the years of prescription, as the nature of the subject did not require or admit of a continued possession. Those

\* A similar decision is said to have been pronounced and affirmed on appeal, in 1777, in an action relative to Maddieston, one of the feus of the same barony.

- in the minority, while they allowed that a possession de die in diem was not necessary, thought that as there was an interruption of nearly 30 years in the workings, this was not a prescriptive possession.

THOMSON & CAMPBELL, W. S.—A. DOUGLAS, W. S.—Agents.

The LORD ADVOCATE, Complainer.

No. 323.

W. JAMIESON, W. S., Respondent.—*L'Amy—Moncreiff.*

*Contempt of Court.*—The Lord Advocate presented a petition and complaint against Jamieson, a writer to the signet, on the ground, that he had written and transmitted to the Lord President of the Court of Session a letter reflecting on his judicial conduct, containing matter disrespectful and insulting to the Court, and injurious to the administration of justice. He was cited to appear personally for examination in presence of both Divisions of the Court. An answer, signed by himself alone, was lodged, in which he objected to the summary mode of trial by petition and complaint; but having obtained leave to withdraw this answer, he gave in another, signed by himself and counsel, acknowledging his offence. The Court found that he had been 'guilty of a high offence against the dignity of this Court, and which tends to prejudice and to slander the due administration of justice therein; and, in having done so, has rendered himself liable to severe animadversion and punishment.' But, in respect of his answer, they resolved not to inflict any punishment on him, except a public reprimand; and ordained him to find caution for his good conduct towards the Court

Feb. 1, 1832.

BOTH DIVISIONS.  
S.

No. 326.

The LORD ADVOCATE, Complainer.

JOHN HAY, Respondent.

Feb. 1, 1822.

BOTH DIVISIONS.  
S.

*Contempt of Court—Jurisdiction.*—During the dependence of an action at the instance of Hay before the Lord Ordinary, he wrote and transmitted to several of the Judges of the Court, to members of Parliament, and to other public and private individuals, letters (some of which were printed) relative to the process. A summary petition and complaint having been presented by the Lord Advocate against him, accusing him 'of having wickedly defamed, calumniated, and libelled several of the Judges of this Supreme Court, and the administration of justice, in relation to the proceedings of the Court,' he appeared in presence of both Divisions, in virtue of a citation to that effect, and was ordained to give in answers, and 'to subscribe the said answers with his own hand.' He refused to accept of the assistance of counsel, and gave in a note, declining the jurisdiction of the Court, on the grounds,—1. That he was entitled to a trial by jury; and, 2. On reasons alleged to be personal to the Judges on the bench. The Court sustained their jurisdiction, and allowed a proof in common form. A minute was then entered on the record by Hay, adhering to his declination, and protesting that his presence should not be deemed a prorogation of their Lordships jurisdiction. In consequence of the terms in which this minute was expressed, the Court found it to be a high contempt; but in order that Hay might not be impeded in his defence, they superseded consideration of it till the issue of the complaint. The proof having been concluded for the prosecution, and Hay hav-

ing refused to adduce a conjunct probation, the Court found the complaint proven, (except as to two letters),—that the above minute was an aggravation of his offence, and on the whole matter, ordained him to be imprisoned for four months, and to find security under a penalty of £300 for his good behaviour towards the Court and Judges for five years.

A. ROLLAND, W. S.—

—Agents.

A. GREIG, Pursuer.—*Baird.*

No. 327.

LADY MALCOLM, Defender.—*Moncreiff—W. R. Robinson.*

*Expences.*—This was a question as to a claim for expences, which the Lord Ordinary refused, on a general principle; but the Court waved it entirely, and found Lady Malcolm not entitled to expences, in respect of the conduct of the cause on her part.

Feb. 2, 1822.

SECOND DIVISION.  
Lord Cringletie.  
F.

D. GREIG, W. S.—J. TAYLOR,—Agents.

R. DENNISTOUN and Co. Suspenders.—*Moncreiff—J. Henderson, jun.*

No. 328.

J. THOMSON, Charger.—*Bell—Alison.*

*Bill of Exchange—Suspension.*—Dennistoun and Company presented a bill of suspension of a charge by Thomson, on a bill, (of which they were accepters), on the allegation that Thomson was not a bona fide holder, as the bill had been collusively indorsed to him by the drawer pending an action of reduction of the bill. The Court adhered to the Lord Ordinary's

Feb. 2, 1822.

SECOND DIVISION.  
Bill-Chamber.  
Lord Meadowbank.  
M'K.



interlocutor refusing the bill, as no proof was offered by writ or oath of the alleged *mala fides*.

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. DUNDAS, W. S.—  
Agents.

No. 329. J. TELFORD, (for STIRLING BANK); Pursuer.—*MacFarlane*.

JAMES, WOOD, & JAMES, Defenders.—*Bell—Green-  
shields—A. Murray*.

Feb. 5, 1822.

FIRST DIVISION.

Lord Gillies.

H.

*Bill of Exchange—Principal and Agent*.—Arnot was the general agent in Scotland of James Wood and James, merchants in London; and, as such, was in the habit of drawing and discounting bills on their account. In January 1819, James Wood and James sold goods to Paterson, for part of the price of which Arnot, in his own name, drew bills on him, which were accepted, and discounted by Arnot with the Stirling Bank. On the face of the bills, and in the letters addressed to the Bank relative to the discounting of them, no mention whatever was made of James Wood and James. But in a letter addressed to Paterson, notifying to him that the bills had been drawn, it was said, 'that, when accepted, they will be placed to the credit of your account with Messrs. James Wood and James of London.' Arnot's agency having been thereafter recalled, a bill was drawn by James Wood and James for the balance of the price, and discounted by them with the Stirling Bank. Both Paterson and Arnot becoming bankrupt, the Stirling Bank raised action for the amount of the bills drawn by Arnot against James Wood and James, on the ground, that they were, in fact, discounted by Arnot as their agent, and for their behoof. The defence was, that they were not obligants on the bills, which

had been discounted on the personal credit of Arnot. The Lord Ordinary decerned against them, 'in respect the bills were granted for the price of goods sold by the respondents to the acceptor, and that the same were drawn and discounted by Arnot, merely as the respondents agent, and for their behoof;' and the Court adhered.

R. JAMESON, W. S.—BROWN & LAWSON, W. S.—Agents.

T. BEVERIDGE, Suspender.—*P. Robertson.*

J. HARPER, Charger.—*Graham Bell.*

No. 330.

*Expences.*—The sole question here was relative to the expences of a suspension and interdict at the instance of Beveridge, complaining of certain encroachments made by Harper and others on the public street. The Lord Ordinary decerned for the expences, and the Court adhered.

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FIRST DIVISION.

Lord Gillies.

S.

J. B. FRASER—J. CHALMERS,—Agents.

J. GIBSON, Pursuer.—*Clerk—Cranstoun—Moncreiff—Jeffrey—Cockburn.*

No. 331.

Sir W. RAE and Others, Defenders.—*Thomson—Mackenzie—P. Robertson—M'Niell.*

*Jury Court—Statute 59. Geo. III, c. 35.*—Sir William Rae and others having granted a bond in order to raise money for carrying on the Beacon newspaper, Mr. Gibson afterwards brought an action of damages against them for certain alleged libels contained in that newspaper. In the summons it was stated, that although Stevenson and Nimmo were the apparent conductors of the newspaper, 'yet persons of another description had been engaged in it, as after mentioned, secretly combining by contributions

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FIRST DIVISION.

Lord Alloway.

H.

‘ in money, and otherwise, to support the said newspaper in its most wicked and nefarious attacks upon the pursuer : that in consequence of this combination, and immediately after or about the time of the publication of the first number of the foresaid newspaper, a bond of credit, for the express purpose of supporting and encouraging the Beacon, including the numbers of that publication in which the pursuer was libelled, was signed and lodged by the defenders : ‘ that in consequence of these facts, and of their general connection with the foresaid Beacon, these persons have all and each, or one and other of them, made themselves responsible to the pursuer for the gross injury and insult that has been inflicted on him, as aforesaid, by the paper thus set up, maintained, encouraged, and paid for by them ;’ and the summons then concluded for damages. The defenders, while they admitted that they had signed a bond for a cash-credit in favour of the Beacon, denied the relevancy of the libel,—that they had entered into the alleged combination,—that they were proprietors of the newspaper, or had any concern in its management. The Lord Ordinary, after hearing a debate on the relevancy of the summons, delayed giving judgment till the following day, when he pronounced this interlocutor.—‘ Having heard parties ‘ procurators, remits the case to the Jury Court.’ The process was accordingly transmitted to the Jury Court, and a condescendence ordered. A representation was afterwards offered to the Lord Ordinary in the Court of Session, but refused as incompetent. The defenders then presented a petition to the Court, praying that the action might be dismissed as irrelevant. They argued that this petition was competent, on the grounds,—1. That the Lord Ordinary had

exceeded his powers, in remitting an action which was irrelevant to the Jury Court ; and, 2. That in consequence of the procedure, which had taken place before the Lord Ordinary, the case should be proceeded ' in according to the course of the Court of Session,' as provided by the 2d section of the statute.

The Court, on advising the petition with answers, refused the same as incompetent.

J. STUART, W. S.—A. STORIE, W. S.—Agents.

EARL of WEMYSS and Others, Advocators.—*Hops.*

No. 332.

D. WARDLAW, Respondent.—*Moncreiff.*

*Process—Advocation.*—Wardlaw having applied to the Dean of Guild of Edinburgh for a warrant to authorize him to erect a dwelling-house on an angle of ground lying between the west division of Queen Street and the grounds of the Earl of Moray, he was opposed by the proprietors of houses in that division of Queen Street, who alleged that they had a servitude non ædificandi. The Dean of Guild granted the warrant ; but a bill of advocation was passed by the Lord Ordinary to try the question. In a petition against this interlocutor, Wardlaw objected to the competency of the bill of advocation, on the ground, that the plea of the advocators involved a question of a right of property which could not be entertained in the inferior court,—that it ought to be brought before the Supreme Court by an action originating there,—and that the passing of the bill of advocation would operate as an interdict against the exercise of his right of property. The Court refused the petition without answers.

Feb. 5, 1822.

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Bill-Chamber.

Lord Glenlee.

M'K.

A. MONYPENNY, W. S.—D. SCOTT, W. S.—Agents.

No. 333. EARL OF ABERDEEN and T. G. WRIGHT, Advocators.  
—*Hope.*

J. LAIRD, Respondent.—*D. M'Farlane.*

Feb. 7, 1822.

FIRST DIVISION.  
Bill-Chamber.  
Lord Meadowbank.  
S.

*Process.*—Laird, by missive-letter to Mr. Wright, as commissioner for the Earl of Aberdeen, who was tutor-dative of the Marquis of Abercorn, agreed to enter into a feu-contract relative to certain portions of ground. In order to force implement of the missive, an action was raised before the sheriff against Laird. The sheriff found, 'that this court is not competent to judge and determine on the validity of facts and circumstances, to the effect of declaring or enforcing a legal transference of heritable property by sale or feu; and, therefore, assoilzies the defender simpliciter, reserving action of declarator or otherwise in the Supreme Court.' The pursuers, accordingly, executed a summons of declarator, and they complained by a bill of advocacy of the sheriff's interlocutor. The Lord Ordinary passed the bill; and the Court adhered.

J. & C. NAIRNE, W. S.—C. J. F. ORR, W. S.—Agents.

No. 334. LADY A. M. JESSOP, Petitioner.—*Fullerton.*

Feb. 7, 1822.

FIRST DIVISION.  
D.

*Statute 1685, c. 22—Title to pursue.*—The late Earl of Strathmore having disposed certain estates, under the limitations of an entail, to and in favour of a series of heirs; whom failing, to his own nearest heirs and assignees whatsoever, Lady A. M. Jessop, the sister of the entailer, but who was not called to the succession except as an heir whatsoever, ap-

plied for authority to record the deed of tailzie under the act 1685, c. 22. Her title, however, being considered very doubtful by the Court, the petition was withdrawn.

R. J. DUNDAS, W. S.—Agent.

BARBARA HUTCHISON, Pursuer.—*Fullerton—Maitland.*

Dr. A. C. HUTCHISON, Defender.—*Moncreiff—R. Robinson.*

No. 335.

*Passive Titles—Homologation.*—By an antenuptial contract of marriage between the parents of the pursuer and defender, their whole property was settled on the children of the marriage equally. The greater part of the property was heritable, to which the defender (the eldest son) made up titles. He afterwards sold it to his brother, James, who did not account for the price to him, but paid the shares due to his brothers and sisters, with the exception of that belonging to the pursuer, to whom he intimated that it was secured on the property. On the faith of this, she accepted from him several years interest. James afterwards having died bankrupt, she discovered that her share had not been secured over the property; and she thereupon brought an action for payment against Dr. Hutchison. His defences were,—1. That he was not liable, having merely made up titles under a family arrangement, in order to effect a division of the estate; and that he had received no more than his own share; and, 2. That the pursuer had homologated the sale to James, and intrusted her share to him. The Lord

Feb. 7, 1822.

FIRST DIVISION.

Lord Gillies.

H.

Ordinary decerned against him ; and the Court adhered.

ALEX. BLAIR, W. S.—R. LOCKHART,—Agents.

**No. 336.** C. GREENHILL, TRUSTEE for J. FORD'S CREDITORS,  
Advocator.—*Clerk—Buchanan.*  
Mrs. FORD, Respondent.—*Cranstown—Greenshields.*

Feb. 7, 1822: *Husband and Wife—Divorce—Collusion—Remis-*

**FIRST DIVISION.** *sio Injuriae—Process.*—Mr. and Mrs. Ford entered  
Bill-Chamber. into an antenuptial contract of marriage, by which  
Lord Meadowbank. he was secured in the liferent-right of whatsoever  
D. means should be acquired by her during the marriage.

In January 1817, the estates of Ford were sequestrated under the bankrupt-act, and adjudged to Greenhill, as trustee for his creditors. Towards the end of 1818, and while Ford was undischarged, an action of divorce was instituted by Mrs. Ford against him, on the head of adultery. The acts libelled on were all posterior to Ford's bankruptcy. The summons concluded, in usual form, for divorce; and to have it found, ' that the defender has forfeited all his rights by contract of marriage, jure maritali, or otherwise.' Ford made no appearance; but Greenhill sisted himself for behoof of the creditors, and stated in defence,—1. That the process was a collusive scheme between Mr. and Mrs. Ford to defeat the rights of his creditors: 2. *Remissio injuriarum*; and, 3. He maintained, that, at all events, the decree of divorce should contain a reservation in favour of the creditors of the liferent-rights provided to Ford in his contract of marriage. The pursuer emitted an oath of calumny, and answered special

questions put by Greenhill relative to collusion. She was afterwards judicially examined: and a proof was allowed, and taken without any protest by Greenhill. The Commissaries found the adultery proved; but, before pronouncing decree of divorce, ordered Greenhill to lodge a condescendence, of the facts he alleged, inferring remissio injuriarum. A condescendence was, accordingly, lodged, in which he renounced all intention of opposing the dissolution of the marriage, but offered to instruct, by parole proof, both collusion and remissio injuriarum. This condescendence was refused as irrelevant; and decree of divorce, without any reservation, was given in terms of the libel. Greenhill thereupon presented a bill of advocation, praying for a remit to the Commissaries, with instructions to recal the decree, to admit his condescendence to proof, and, in the event of decree of divorce being again pronounced, to reserve the interests of the creditors. In his bill he urged that he was still entitled to prove collusion; but admitted that he had no wish to oppose decree of divorce, to the effect of dissolving the status of the parties. The Lord Ordinary refused the bill on the following grounds, which he stated in a note.—

' 1. Because pleas of remission and collusion can only be competently urged in bar of the marriage of the parties litigated; but in this bill, as well as in the proceedings before the Commissaries, the complainant has renounced all intention of objecting to the marriage of Mr. Ford and the pursuer being dissolved: 2. Because collusion can only be competently proved before the oath of calumny has been emitted; and, 3. Because the circumstances alleged to have taken place are not relevant to sup-



port the plea of remission. To the interlocutor of the Lord Ordinary the Court, on the 13th November 1821, adhered.

Thereafter Greenhill prayed the Commissaries to admit a reference to the pursuer's oath of the defence of remissio injuriæ; but (it was said) they declined to write on the process. The Lord Ordinary refused a bill of advocation; and the Court adhered, in respect no minute of reference had been tendered to the Commissaries; and a petition, praying the Court to remit to the Commissaries with instructions to receive a proper minute of reference, was afterwards refused.

T. DRUGHAR.—R. RATTRAY, W. S.—Agents.

No. 337. J. MITCHELL and T. GRAY, Suspenders,—*Moncreiff*  
—*D. M'Farlane*.

J. CALDER, Charger.—*Blackwell*.

Feb. 7, 1822.

SECOND DIVISION.

Lord Pitmilley.

M'K.

*Insurance—Stranding*.—The schooner Naughton, belonging to Calder, loaded with salt, was insured against the perils of the sea, from Liverpool to Leith, by Mitchell and Gray. The policy bore, that 'corn, fish, salt, &c. are warranted free from average, unless general, or the ship be stranded.' In an action raised on this policy, the question was, Whether there had been a stranding?

To establish this, Calder founded on certain occurrences,—1. At Loch Strangford. 2. At Lothendale.

1. Loch Strangford.—From the log-book and protest it appeared that the vessel sailed from Liverpool on 4th December 1814: that on the 9th, 'at 2 P. M. the ship got abreast of the roads, (of Loch Strang-

‘ford), but the tide ran so high that the vessel could not get into the roads: the pilot making too free with the shore, got aground upon the lee-shore; but the appearant immediately got assistance from a revenue cutter’s boat with ten hands, and carried out the small bower anchor to the windward; and when the tide made, got the vessel off,\* by heaving upon the anchor: at 7 P. M. came to in the roads with the best bower anchor.’ She remained five days at Loch Strangford, without showing signs of damage; but on going to sea, it blew strongly, and she made much water.

2. Lochendale.—The vessel being in great distress, ran for Lochendale, and ‘at 10 A. M. got a pilot on board; and ‘at 11 run the ship before the wind on the beach, to get her trimmed again in a proper manner. The vessel being so much by the head, she took the ground forward, and swung round on her keel. At noon, the gale still increasing, with a heavy sea running, was obliged to let go both anchors: veered away the long service: the sea running so heavy, the vessel struck several times on the ground, which caused her to make a great deal of water.’ The salt having been damaged, Mitchell and Gray refused to pay the loss, alleging that there had been no stranding. In an action raised against them in the Court of Admiralty, the Judge-Admiral, holding that a stranding had been proved at Loch Strangford, but not at Lochendale, decerned against them. In a suspension, the Lord Ordinary was of the same opinion; and found, ‘that the legal construction of the memorandum is, that in the event of the ship’s

\* In the log-book it was added, ‘without any damage, as far as we know.’

• being stranded, the insured is entitled to claim his  
• whole partial loss.' To this judgment the Court  
adhered.

Observed on the Bench, that if a legal stranding was established, it was not necessary to prove actual damage to the vessel: that a mere touching of the ground, and passing on, was not a stranding; and that the circumstance of the stranding, having been occasioned by the rashness of the pilot, was of no importance.

D. MURRAY, W. S.—FERGUSON & M'DOUGALL,—Agents.

No. 338.

JOHN M'LEOD, Pursuer.—*Fullerton.*

Mrs. R. THOMPSON.—*Jameson—J. Henderson, jun.*  
and

J. C. THOMPSON, Defenders.—*L'Amey.*

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Lord Gillies.

D.

*Debtor and Creditor—In Rem Versam.*—The title-deeds of a property belonging to Mrs. Thompson having been hypothecated for an account due by her to a writer, she desired her son to pay the debt and get the deeds. The son borrowed the money from M'Leod, with which he paid the debt, and received delivery of the title-deeds. M'Leod having raised action against both the mother and son for repayment of the money lent, and having referred the grounds of his action to their oaths, the Lord Ordinary decerned against the son, in respect he admitted that he had borrowed the money; and against the mother, in respect that she admitted that she had employed her son to get the title-deeds, and that the money lent was in rem versam of her. And the Court adhered.

R. HOTCHKIS, W. S.—P. ORR, W. S.—J. LYON,—Agents.



J. M'LEAN, Suspender.—*P. Robertson.*  
 COMMISSIONERS OF LORD MACDONALD, Chargers.—  
*Murray—M'Donald.*

No. 339.

*Process—Judicial admission.*—An action having been raised before the sheriff-court of North Uist against M'Lean, as tenant of a farm, for arrears of rent, he admitted that he was the tenant, but denied that the arrears were due. Decree was pronounced against him, and a charge on it given. He suspended, on the allegation that, in point of fact, he was not tenant, but was only manager for his mother, to whom the farm had been let; and he alleged that the admission in the inferior court arose from the ignorance of his agent there. The only evidence of the lease was an entry in the sederunt-book of the chargers, which was rather ambiguous. The Lord Ordinary and the Court, however, considering that it was now too late for the defender to retract his admission, found the letters orderly proceeded.

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 H.

J. A. CAMPBELL, W. S.—M'QUEEN & M'INTOSH, W. S.—Agents.

Mrs. M'MICKEN TORRANCE and HUSBAND, Petitioners.—*Buchanan.*

No. 340.

A. CRAUFUIRD, Respondent.—*Clerk—Cockburn.*

*Execution pending Appeal—Stat. 10. Geo. III, c. 51.*—Mrs. Torrance, an heir of entail in possession; obtained decree, in terms of the libel, in an action of declarator of improvements under 10. Geo. III, c. 51; against Craufuird, as the heir next in succession, and also for the expences of process. Craufuird having

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appealed, she prayed for interim-execution as to the expences. This was opposed on two grounds.—1. Because there was no conclusion for expences in the summons of declarator : 2. That the statute 10. Geo. III, c. 51, makes no provision for a decerniture of costs in an action of declarator. The Court, however, granted execution in common form.

J. & A. SMITH, W. S.—A. CRAUFUIRD, W. S.—Agents.

No. 341. The MONKLAND CANAL COMPANY, Advocators.—  
Clerk—*Jardine*.

J. MERRY, Respondent.—*Moncreiff*—*H. Drummond*.

Feb. 8, 1822. *Advocation*—*Stat. 50. Geo. III, c. 112, § 56*.—In  
an action of ejection from certain quay-room on the  
FIRST DIVISION. Monkland Canal, brought by the Company, under a  
Bill-Chamber. bye-law made in virtue of a special clause of the 10.  
Lord Meadowbank. Geo. III, c. 105, against Merry, defences were given in,  
S. alleging that the action was raised in æmulationem.  
After some procedure, the inferior court, ‘ for the  
‘ purpose of disposing of the present case, and, if pos-  
‘ sible, without the necessity of a proof, ordain the  
‘ pursuers to produce, before answer, quamprimum,  
‘ a copy of the trade of each trader on the Monk-  
‘ land Canal, upon which, agreeable to their bye-law  
‘ of 4th November 1818, they have meditated the  
‘ proposed change in the appropriation of the de-  
‘ fender’s quay-room ; reserving to determine quoad  
‘ ultra.’ The Canal Company having obtained leave  
from the inferior court to advocate, ‘ so far as the  
‘ same may be competent, in terms of the act of par-  
‘ liament,’ presented a bill of advocacy, on the  
ground of an objection to the mode of proof. The

Lord Ordinary refused the bill as incompetent; and the Court adhered.

WM. PATRICK, W. S.—J. FORMAN, W. S.—Agents.

Sir W. M. NAPIER and Others, Complainers.—*Blackwell.* No. 342.

J. HOWIE, Respondent.—*Spiers.*

*Member of Parliament.*—Mr. Howie having been inrolled by the freeholders of Renfrewshire on the lands of Wrightland and Damshot, (each of which had been retoured to a twenty shilling land of old extent), Sir W. M. Napier and others presented a petition and complaint, praying the Court to ordain Howie's name to be expunged from the roll, on the ground, ' That the extract of ' the retour produced does not afford legal evidence ' that the lands of Damshot, therein mentioned, are ' the lands in the claimant's titles, as formerly with- ' in the ancient parish of Paisley, and now, by annexation, within the parish of Pollock, lately called Eastwood, or parish of Paisley.' The extract of the retour had been damaged by age or accident, so as to be illegible in some places; and, in particular, the lordship or jurisdiction in which the lands were situated could not be discovered from the descriptive clause; but the Court, holding that the identity of the lands was sufficiently established by other parts of the deed, and by a regular progress of titles of the lordship of Darnley, of which they were a part, dismissed the complaint.

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D.

A. PEARSON, W. S.—W. PATRICK, W. S.—Agents.

No. 343. N. WILSON and Others,—Suspenders.—*Moncreiff—  
A. Dunlop, jun.*

J. KIPPEN and Others, Chargers.—*Clerk—Forsyth.*

Feb. 8, 1822, *Society—Title to Pursue.*—An association was  
 FIRST DIVISION. formed in Greenock for the establishment of a coffee-  
 Lord Gillies, room, which was supported by annual contributions,  
 S. and governed by a set of general regulations inserted  
 in a sederunt-book. By one of these rules it was  
 declared, that 'the affairs of the coffeeroom shall be  
 ' managed by a committee of nine subscribers, one  
 ' of whom to be treasurer, and three a quorum, who  
 ' shall have the sole direction of every thing con-  
 ' nected with the establishment, and also power to  
 ' call a general meeting, and to make such tempor-  
 ' ary regulations as may appear to be necessary.' A  
 dispute having arisen among the members, they di-  
 vided into two parties; and at a general meeting it  
 was resolved by the majority to separate from the mi-  
 nority, and to withdraw from the room in which the  
 association met. At the same time, authority was  
 given to the committee 'to take such steps as by  
 ' them shall be deemed most eligible for securing  
 ' their interest in the furniture, and paying off the  
 ' debt already contracted and to be contracted this  
 ' year.' Wilson and five others (who were in the  
 minority) presented a petition to the sheriff 'for  
 ' themselves, and in name and behalf of the frequent-  
 ' ers of the coffeeroom in the Exchange Buildings  
 ' in Greenock,' alleging that it was intended by  
 M'Nair and others to carry off the furniture, and  
 praying for an interdict. The sheriff granted warrant  
 of service and interim-interdict. Compearance was

then made for Kippen and others, as 'being a majority of the committee of management of the coffee-room in Greenock, conformable to minute of election,' &c.; and in their subsequent pleadings they stated, that they also appeared 'for themselves'. Their title was objected to; but the sheriff sustained it, on the ground, (as stated in a note), that 'if any persons at all could have a title to appear in such a question, it seems to be the committee of management. This committee is chosen by a majority of the subscribers, and, by the 10th article of the coffee-room regulations, is declared to have the sole direction of every thing connected with the establishment.' Having recalled the interdict, and decreed for expences, Wilson and others suspended a charge on the same grounds which had been urged before the sheriff. In this process, Kippen and others defended themselves under their former designation, with the addition, that they appeared also 'for themselves and others, per mandate in the inferior court process.' The Lord Ordinary and the Court found the letters orderly proceeded.

MACMILLAN & GRANT, W. S.—YOUNG, AYTOUN, & RUTHERFORD, W. S.—Agents.

D. MONRO, Suspender.—*Christison.*

No. 344.

R. AYTOUN and Others, for the RENFREWSHIRE BANKING COMPANY, Chargers.—*A. Connell.*

*Bill of Exchange—Proof.*—Monro, the acceptor of a bill, (which he alleged was an accommodation one to the drawer), presented a bill of suspension of a charge on it by the Renfrewshire Banking Com-

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pany, on the allegation that they were not onerous and bona fide holders, and offered to establish this by the Bank books. But the Lord Ordinary and the Court, considering his offer of proof too vague, refused the bill, reserving to him to refer to oath.

W. Renny, W. S.—ARCHD. CONNELL, W. S.—Agents,

No. 345.

J. TURNER, Suspender.—*Christison*.

RENFREWSHIRE BANKING COMPANY, Chargers.—*A. Connell*.

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The circumstances and decision in this case were

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W. Renny, W. S.—ARCHD. CONNELL, W. S.—Agents.

No. 346.

DUKE of HAMILTON, Petitioner.—*Fullerton*.

Mrs. S. WARING, Respondent.—

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M'K.

*Tailzie—Tack*.—Decree applying the judgment of the House of Lords, reversing the interlocutor of the Court of Session of 21st May 1816, and finding, ' that the leases in question were not warranted by ' the power contained in the deed of entail, and, there- ' fore, subject to reduction, unless the same were ho- ' mologated by the late appellant, Archibald Duke ' of Hamilton and Brandon, deceased, and by the ' appellant, Alexander, now Duke of Hamilton and ' Brandon, and so far as the same were homologated; ' and remitting the cause back to be reviewed, subject to this finding.\*

Ro. AYTOUN, W. S.—FORSYTH & M'DOUGALL,—Agents.

\* Date of reversal 24th July 1820.

D. THOMSON, Advocate.—*Moncreiff—Buchanan.*  
J. S. OLIPHANT, Respondent.—*Cockburn—Cuning-*  
*hame.*

No. 346.

*Tack—Landlord and Tenant.*—Thomson having built some houses on a farm, of which he was tenant, he insisted, at the end of his lease, that he had the option either to remove them or to put them into repair, and he proposed to carry them off. This was resisted by Oliphant, the proprietor; and in an action before the inferior court Thomson was ordained to leave them in good repair. But the Lord Ordinary, in an advocacy, held, ‘that the advocator (the tenant) is entitled to his option of either removing the houses which were built by him on the farm, without any obligation to do so in his lease, and of restoring the ground on which these houses stand to its previous state, or of paying to the pursuer £15 : 7 : 4, as necessary, in order to put these houses in good condition.’ The Court so far altered this interlocutor as to find, that while the tenant was not bound to put the houses in repair, he was not entitled to remove them.

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M’K.

W. GARDNER, W. S.—Æ. M’BEAN, W. S.—Agents,

NISBET and PEEBLES, Suspenders.—*Baird.*  
GRAHAME and MARTIN, Chargers.—*Blackwell.*

No. 347.

*Suspension.*—Grahame, after granting a trust-disposition of his estate in favour of Nisbet and Peebles, with power to sell, conveyed it in trust, with a similar power; to Martin, who obtained the first infeftment. He

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also authorized Martin to raise a reduction of the prior trust-deed, on the ground of force and fear. An action was, accordingly, instituted; and a counter one was brought by Nisbet and Peebles of the trust-deed in favour of Martin. In the meanwhile, Martin having advertised the property for sale, Nisbet and Peebles presented a bill of suspension and interdict, which the Lord Ordinary refused, in respect of no caution. But the Court remitted to him 'to pass the bill of suspension and interdict, upon full caution for all damages which might arise therefrom.'

WM. WADDELL, W. S.—W. A. MARTIN, W. S.—Agents.

**No. 348.** J. GLEN, TRUSTEE for HOGG'S CREDITORS,—*Fullerton.*

MISS PORTERFIELD,—*H. J. Robertson.*  
Competing.

**Feb. 12, 1822.** *Bankrupt—Sequestration—Expences.*—Miss Porterfield was infeft in certain lands belonging to Hogg, in security of an annuity, with a power of sale in the event of the annuity not being regularly paid. Hogg became bankrupt, and his estate was sequestrated. The trustee, with the view of effecting an advantageous sale of the lands, entered into a transaction with Miss Porterfield, by which she agreed to renounce her security, and in place of it 'to accept of the principal sum paid for the annuity, on receiving six months notice, on the annuity due at Martinmas last being immediately paid up, and on the trustee becoming bound for the regular payment of the annuity in time to come, while it remains unredeemed.' Miss

**FIRST DIVISION.**  
**Lord Alloway.**  
**D.**

Porterfield did not rank on the estate : and the lands having been afterwards sold, a dispute arose between her and the trustee as to whether she was liable for any part of the expences of the sequestration. In a multiplepoinding raised by the purchaser, the Lord Ordinary, ' in respect Miss Porterfield, in virtue of ' her prior heritable right, had the power of selling ' this property, and that she never claimed under ' the sequestration, and also in respect of the transac- ' tion which took place betwixt her and the trustee, ' repels the claim to make her liable for the expences ' of the sequestration in proportion with the other ' creditors.' To this judgment the Court adhered.

The trustee founded on the case of Godwin against Brown, 1st February 1815, Fac. Coll. ; but the Court, (independent of the transaction with the trustee) considered it different, as the creditor there had no power of sale.

G. NAPIER,—A. PEARSON, W. S.—Agents.

CHRISTIAN GRAHAM, Pursuer.—*D. Dickson.*  
Captain J. THOMSON, Defender.—*Greenshields—*  
*Hutcheson.*

No. 849.

*Master and Servant.*—Mrs. Thomson, during the Feb. 12, 1822.  
absence of her husband, conceiving that Christian Graham, her servant, had been guilty of misconduct, offered to her full wages, on condition that she would leave her service; or board-wages till Captain Thomson's return, provided she would re-  
side out of the house. Graham refused both of these offers, and left the house. After being absent for some days, she returned, and stated that she

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was willing to accept of wages and board-wages till the expiration of her engagement; but this Mr Thomson refused. Graham thereon raised an action against Captain Thomson, on the ground of dismissal, and concluding that he should be ordained to take her back, and pay board-wages for the period her absence, or be found liable in wages and board-wages till the ensuing term. The defences were, that the pursuer had not been dismissed, but that she had deserted her service. The inferior court, without entering on the alleged misconduct, allowed a proof of the dismissal; and afterwards, 'in respect it is not proved that the pursuer was dismissed from her service, but that, on the contrary, it appears that she rejected an arrangement proposed by Mrs. Thomson, of receiving 7s. per week till Captain Thomson should return from London and dispose of the case, and that she left the place on that occasion without being ordered to do so, and of her own motion, dismisses the action, and assoilzies the defender.' On advising a bill of advocacy, the Lord Ordinary remitted the case to the sheriff, with instructions to recal the interlocutor complained of; and, before answer, to appoint the defenders to give in a special condescendence of the circumstances of misconduct on the part of the pursuer which induced them to order her removal from their family.' The Court, by a majority, adhered to this interlocutor.

Several of the Judges observed, that a master has a right to dismiss a servant, without assigning any cause, on payment of wages and board-wages; or he may oblige him to reside out of his house, on paying board-wages.

JAS. TODD, W. S.—R. RATTRAY, W. S.—Agents.

BEVERIDGE, Suspender.—*P. Robertson.*

No. 350.

J. TAYLOR, Charger.—*Rose Robinson.*

ances.—In this case there was no general  
The sole question regarded Taylor's liability  
expenses of a process of suspension and inter-  
dict raised by Beveridge, complaining of certain en-  
croachments on the public street by Harper, Taylor,  
and others. Taylor alleged that he had only contri-  
buted a small sum of money to remove what he con-  
sidered a nuisance, and that, therefore, there were  
no grounds of complaint against him. But the Lord  
Ordinary and the Court found him liable in the ex-  
pences, as the operations complained of would have  
been beneficial to him, and as he had appeared and  
debated the case on the merits.

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J. B. FRASER—J. TAYLOR,—Agents.

T. HORSBURGH, Advocate.—*Gordon.*

No. 351.

G. FERNIE,—*Jeffrey*—*D. M'Farlane.*

and

LORD LEVEN, Respondents.—*Lockhart.*

An action having been raised against Horsburgh  
for payment of a certain sum of rent, the inferior  
court decerned against him. The decision of the  
case depended on the import of a special agreement,  
and involved no general point. In an advocacy,  
the Lord Ordinary repelled the reasons; and the  
Court adhered, under certain qualifications.

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Lord Pitmilley.

M'K.

J. ELDER, W. S.—GREIG & PEDDIE, W. S.—GIBSON & OLIPHANT, W. S.—Agents.

No. 859. N. STEVENSON, Advocate.—*Cranston—Forsyth.*  
D. COOPER, Respondent.—*Jameson—Shaw.*

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Lord Pitmilly.

B.

*Tack—Landlord and Tenant.*—Stevenson let an urban tenement, from Whitsunday 1819 to Whitsunday 1820, to William Stevenson, who subset it to Cooper, and he again subset it to M'Farlane. M'Farlane having failed to pay the rent due at Whitsunday 1820, Cooper, within three months, executed a sequestration of his effects; but he did not pay the rent to the landlord or to the principal tenant. Stevenson, the landlord, let the premises to MacFarlane from Whitsunday 1820 to Whitsunday 1821, but never executed a sequestration for the rent of the previous half year. A warrant having been got by Cooper to sell off the sequestrated effects, Stevenson applied to the inferior court for an interdict, which was refused. In an advocacy, the Lord Ordinary remitted, with instructions to adhere, on 'Cooper finding security to pay the complainer the half-year's rent due at <sup>Whitsunday</sup> Martinmas 1820 out of the proceeds of the sequestrated effects.' To this judgment the Court adhered, with the variation, that the security, instead of being limited to the extent of the sequestrated effects, should be absolute.

D. FISHER—C. FISHER,—Agents.

J. M'EWEN, (TRUSTEE for ADAMS' CREDITORS), Pursuer.—*Buchanan*.

No. 352.

BLAIR and MORRISON, Defenders.—*M'Farlane*.

*Arrestment*.—A quantity of goods, belonging to Steele, having been arrested by Adams in the hands of Blair and Morrison, a warrant was obtained from the sheriff in their name, (though they alleged without their authority), for selling them off by public roup, for behoof of all concerned, and lodging the price in court. The goods were sold, and a debt due to Blair and Morrison by Steele was paid from the proceeds. Thereafter Adams obtained decree of forthcoming against them; and a multiplepoinding was raised in their name, in which the usual interlocutor was pronounced. Blair and Morrison then made appearance, and stated that they had no funds; that they had delivered up the goods under the warrant of the sheriff, and that the proceeds were paid by the auctioneer to Lawrie, a writer, (now bankrupt), who had fraudulently made use of their name, and who, they alleged, was employed by the arresting creditor. The Lord Ordinary found, ' that at ' the time the arrestment in question was used it is ' admitted that there was a considerable quantity of ' goods in the hands of the arrestees; that they gave ' up these goods without the knowledge or consent ' of the arrester; and that they are accountable for ' their value.' To this interlocutor the Court adhered.

Feb. 13, 1822.

FIRST DIVISION.

Lord Alloway.

S.

T. MEGGET, W. S.—DONALDSON & RAMSAY, W. S.—Agents.



No. 354.

J. A. BERTRAM, Suspender.—*A. Anderson.*  
W. M'INTOSH, Charger.—*Matheson.*

Feb. 13, 1822.

FIRST DIVISION.  
Bill-Chamber.  
Lord Meadowbank.  
H:

*Society—Process.*—M'Intosh was cautioner, to the extent of £800, in a bond for a cash-credit by Sir W. Forbes and Company to Ballingall and Company. The latter becoming bankrupt, and a balance being due on the bond, M'Intosh was obliged to pay it to the extent of his obligation. Having received an assignation, in order to operate his relief, he gave a charge to Bertram, as a partner of Ballingall and Company, who presented a bill of suspension, on the ground that he had retired from the company before the debt was contracted, and that he had notified this in the Gazette. The Lord Ordinary refused the bill, in respect that no caution was offered; but the Court, in consequence of a letter from Sir W. Forbes and Company being produced, which proved that they had seen the notice in the Gazette, remitted to the Lord Ordinary to pass the bill without caution.

V. HATHORN, W. S.—J. GORDON, W. S.—Agents.

No. 355.

J. NEILSON, Pursuer.—*J. Tait.*  
Mrs. WILSON and HUSBAND, Defenders.—*Alison.*

Feb. 13, 1822.

FIRST DIVISION.  
Lord Gillies.  
S.

*Mandatory—Expences.*—An action of reduction of a deed, on the head of deathbed and fraud, having been raised by Robertson, (residing in England), and Neilson, as his mandatory, the Lord Ordinary, in consequence of the verdict of a jury, assilzied the defenders, and found Neilson liable for the expences of process. Against this judg-

ment he reclaimed, on the ground, that after the case had been remitted to the Jury Court he had intimated to the defender's agent that he had ceased to act as mandatory, and had withdrawn his mandate from process, and that a new mandate in favour of another person had been lodged and read in presence of the parties in the Jury Court. But the Court, holding that he should have intimated, by an entry on the record, that he had retired from acting as mandatory, and that there was no evidence of the new mandate being accepted, adhered.

TAIT, YOUNG, & LAWRIE, W. S.—N. GRANT,—Agents.

J. STUART, TRUSTEE ON J. CAMPBELL'S Estate, Petitioner.—*Hope*.

No. 356.

*Bankrupt—Trustee—Stat. 54. Geo. III, c. 137, § 16.*—On the application of a creditor of Campbell, who had been a merchant in the Isle of Skye, and had latterly resided in Argyleshire, but was now in Van Dieman's Land, Lord Glenlee, Ordinary on the Bills, sequestrated his estate, and appointed the creditors to meet in Edinburgh, in order to elect an interim-factor, and thereafter a trustee. Only one creditor resided in Inverness-shire,—none in Argyleshire,—three-fourths of the creditors were resident in Edinburgh, and the others lived nearer to Edinburgh than to the place of business or residence of the bankrupt. The trustee having applied for confirmation, brought these circumstances under the consideration of the Court; who approved of the Lord Ordinary's appointment, and granted decree of confirmation.

Feb. 13, 1822.  
FIRST DIVISION.  
D.

R. ROY, W. S.—Agent.

No. 357.

J. J. WILSON, Pursuer.—*Forsyth—Jameson.*J. B. FRASER,—*Cranstoun—Moncreiff—Skene—  
Gillies.*

Feb. 13, 1822.

*Real or Personal—Heritable Security—Condition.*

SECOND DIVISION.

Lord Pitmilley.  
B.

—Douglas, who was infest on a crown-charter, sold part of Blackburn to Wilson, who, after having been infest base, resold the lands to Douglas for £11,000. The dispositive clause in the disposition by Wilson to Douglas was qualified with the declaration, ‘ that the lands, &c. are hereby dis-  
‘ poned under the express burden of the aforesaid  
‘ sum of £11,000; and which sum of £11,000 is  
‘ hereby declared a real lien and burden affecting the  
‘ aforesaid lands, and appointed to be ingrossed in  
‘ the infestment or resignation to follow hereon, and  
‘ in all future transmissions and investitures of the  
‘ said lands, ay and until the said sums be completely  
‘ paid up.’ Power was given to Wilson to enter into possession, and draw the rents if the interest was not regularly paid; and in the event that any of the instalments of the price should remain unpaid for three months after falling due, it was declared, ‘ that not-  
‘ withstanding of any infestment or resignation which  
‘ may follow hereon in favour of the said Thomas Dou-  
‘ glas, it shall also be lawful and in the power of  
‘ me and my foresaids to revert to the infestment in  
‘ my favour before narrated, and in virtue thereof,  
‘ (and without any process or declarator to establish  
‘ our right), to sell and dispose of the whole lands  
‘ and others before described, by public roup or pri-  
‘ vate sale.’ A procuratory of resignation ad rema-

mentiam was granted, in which it was also declared, that the lands were resigned, 'with and under the ' real lien and burden of £11,000, &c., and with and ' under the several provisions and declarations before ' written.' The procuratory was duly executed, and the instrument of resignation recorded; and Douglas then sold the lands to Fraser. None of the above conditions (it was said) were inserted in Fraser's titles. Wilson having thereafter intimated his intention to sell the lands, for payment of some of the instalments due to him by Douglas, a bill of suspension and interdict was presented by Fraser, on the ground that no real burden had been created on the lands. An action of declarator was thereupon raised by Wilson, to have it found that the lands were burdened with the debt due to him, and that he had power to sell. He also instituted an action of poinding the ground and of removing. Fraser, in defence, stated,—1. That no real burden could be created by a resignation ad remanentiam, which had only the effect to extinguish the vassal's right, and consolidate it with the right of superiority. 2. That neither a poinding of the ground nor a removing was competent to one not infeft in the lands. The Lord Ordinary found, that 'Wilson has ' a real lien over the lands of Blackburn, in security ' of the balance of the price due to him, to bring ' the lands to sale for payment of the balance;' decerned in the actions of poinding and of removing, and repelled the reasons of suspension. To this judgment the Court adhered.

Observed on the Bench, that the real burden over the lands inferred a right to poind the ground; and a

power to remove was a consequence of the right to sell, so as to give entry to a purchaser. None of their Lordships doubted that a real burden was effectually created by the resignation ad remanentiam.

W. SMITH—J. B. FRASER,—Agents.

No. 358.

R. and G. GORDON, Suspenders.—*More.*

J. and A. MILNE, Chargers.—*Brown.*

Feb. 13, 1822.

SECOND DIVISION.

Lord Pitmilley.

B.

*Process.*—In a suspension of a charge on a bill drawn by Gordons, (but not accepted by the drawees), they objected, that the charge was null, as the protest had not been registered till thirteen months after the date of the bill. The Lord Ordinary sustained the objection, but turned the charge into a libel: and Gordons having complained of this, the Court adhered, holding that this was now no longer an open point.

J. FRINGLE, W. S.—J. DUDGON, W. S.—Agents.

No. 359.

H. LEISHMAN, Advocate.—*Jardine.*

G. MERCER, Respondent.—

Feb. 14, 1822.

FIRST DIVISION.

Lord Gillies.

H.

*Bill of Exchange—Process.*—The question at issue here was, Whether a bill, on which Mercer raised action against Leishman, was fraudulently acquired by him after it had been paid? The inferior court and the Lord Ordinary, holding the allegation of fraud not established, decerned against Leishman; but, on a petition, the Court, after allowing a diligence

to recover farther evidence, and no answers having been given in, as ordered, assolized him.

J. LYON—J. FORMAN, W. S.—Agents.

T. M'WHIRTER, Pursuer.—*Moncreiff—Fergusson.*

No. 360.

W. GUTHRIE, Defender.—*L'Amy—A. Gillies.*

*Society—Process—Res Noviter.*—M'Whirter and Guthrie entered into partnership as writers, without any written contract, or any stipulation that the one should hold a greater share than the other. After the lapse of some years the concern was dissolved, and mutual actions of count and reckoning were instituted and conjoined. These were remitted by the Lord Ordinary to an accountant; and the only general point which arose was, Whether Guthrie was entitled to charge the company with an extra allowance for personal labour? The accountant finding it established that the greater part of the business of the company had been performed by Guthrie, allowed him £30 per annum; and the Lord Ordinary approved of this, 'in respect it seems to be reasonable, that when a person advances more capital than his copartner, he should be entitled to interest upon that advance; and, in the same manner, when a partner gives his labour as an extra capital, and takes the whole charge of a department, by which means he enables his partner to employ his time for his own advantage in another way, as was the case between these parties, and which the accountant has estimated at only £30 per annum.' But the Court, on the 26th January 1821, altered this interlocutor, 'in so far as it al-

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FIRST DIVISION.

Lord Alloway.

S.

‘ lows Mr. Guthrie an extra allowance for extraor-  
 ‘ dinary trouble; find that the division of the profits  
 ‘ must be by equal shares; and remit to the Lord  
 ‘ Ordinary to proceed accordingly.’ quoad ultra they  
 adhered. Against this interlocutor both parties re-  
 claimed. The reclaiming days expired on the 15th  
 February; and on that day M’Whirter’s petition was  
 fee-funded, but it was not marked as boxed till the  
 16th, and it did not bear any marking by a Clerk of  
 Session. The Court appointed it to be answered,  
 but refused Guthrie’s petition on the question of ex-  
 tra allowance. On the 24th of May an additional  
 petition was given in by M’Whirter, on the ground,  
 that he had lately discovered in his own possession  
 vouchers for some of the articles which he claimed,  
 but which he alleged the accountant had refused to  
 sustain, merely because they were then unsupported  
 by legal evidence. The Court, on advising answers  
 to these two petitions, refused the first, as incompe-  
 tent; ‘ but find, that the additional petition of 24th  
 ‘ May is competent, as founded on *res noviter ve-*  
 ‘ *niens ad notitiam*; and, before answer, remit of  
 ‘ new to Mr. Greig, accountant, that he may consi-  
 ‘ der how far the documents of evidence stated in  
 ‘ the petition to be *noviter reperta*, support the  
 ‘ objections to his former report, and how far they  
 ‘ alter the state of accounting between the parties.’

T. M’WHIRTER—W. GUTHRIE,—Agents.

J. RINTOUL, Suspender.—*Whigham*.  
 J. MURDOCH, (ASSIGNEE of MAIR), Respondent.—  
*Greenshields*.

No. 361.

The question here was, Whether Mair (the cedent of Murdoch) had a good claim against Rintoul for reaping certain oats? Rintoul alleged that he held them merely in trust for Mair, and, consequently, that Mair had no right to wages; but the inferior court found the claim proved; and, in a suspension, the Lord Ordinary and the Court repelled the reasons.

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 SECOND DIVISION.  
 Lord Cringletie.  
 B.

T. GRIERSON, W. S.—J. GEMMELL,—Agents.

LADY M. L. CRAWFURD, Pursuer.—*Alison*.  
 TRUSTEES on the CERES ROAD, Defenders.—

No. 362.

*Road*.—This was an action of declarator by Lady M. L. Crawford, to have it found that she had a preference over the road trustees on the proceeds of the tolls on a road from St. Andrew's to Struthers, passing through her estate, for money advanced by her on the road. She rested her pretensions on two grounds.—1. That she was not a trustee, but a creditor; and, 2. That the requisites of the Fifeshire road-statute having been disregarded by the trustees, they were barred from competing with her. The Lord Ordinary and the Court held, that although she was not qualified to act as a trustee, yet she was here in pari casu with the trustees; and, therefore, assoilzied them.

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 SECOND DIVISION.  
 Lord Cringletie.  
 M'K.

G. LYON, W. S.—S. C. SOMMERVILLE, W. S.—Agents.



No. 368. CUTHBERT'S TRUSTEES, Advocators.—*Fullerton—Hope.*  
G. SKENE, Respondent.—*Clerk—Skene.*

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SECOND DIVISION.

Lord Pitmilley.  
F.

*Tack—Clause—Condition.*—Cuthbert held a lease from Skene, by which he was bound, before the end of the first ten years, to divide the whole farm with stone fences. Previous to that period, Cuthbert assigned the lease to trustees, who renounced it in favour of Skene, on the condition, inter alia, 'that if the said George Skene, upon reletting the farm, obtains a rise of rent to the extent of £40, he shall have no claim on the said Robert Cuthbert or his trustees for completing the inclosing of the farm with stone fences; but in case he shall not receive a rent to the extent before mentioned, then the said trustees hereby become bound to pay to the said George Skene such a sum, to be fixed by men to be mutually chosen, as will complete the inclosing of the said farm.' The farm was let at a rise of £36 of rent. Skene having claimed the value of the fences, the trustees resisted payment, on the grounds,—1. That the transaction under which the farm was relet being a complicated arrangement, imposing various obligations on the incoming tenant, peculiar to his situation, afforded no test of the fair rent of the farm, and that the landlord had not allowed a fair competition; and, 2. That, at all events, they were entitled to a deduction proportioned to the surplus of £36 which had been obtained. The inferior court decerned against them; and, in an advocacy, the Lord Ordinary repelled the reasons. To this judgment the Court adhered.

HOTCHKISS & TYTLER, W. S.—ROBINSON & PATERSON, W. S.—  
Agents.

Mrs. BUCHANAN, Claimant.—*Cranston—Mackenzie.* No. 364.

W. FERRIER, Common Agent in the Ranking of Torrie.—*Dean of Faculty Ross—A. Connell.*

*Husband and Wife—Competition—Ranking and Sale.*—By contract of marriage between Mr. and Mrs. Buchanan, on which infestment was taken, she disposed to him the liferent of her estate of Kirkcorthar, in case he should survive her; and he disposed to her, in the event of her surviving him, the liferent of his lands of Torrie. Her property was unburdened, and produced £200 per annum; while the rental of his estate, after deduction of the interest of heritable debt, was only £60. In order to put her on an equality, he bound himself to provide her a liferent-annuity of £140. She accepted the provision, in her contract of marriage, 'in full satisfaction of all terce, lands, half or third of moveables, and every other claim or provision whatsoever which she could by law demand, by and through the decease of the said Archibald Buchanan.' Her husband having died insolvent, his estates were sold under a process of ranking and sale, and brought a price, the interest of which exceeded considerably the proven rental. In the ranking she made various claims, which the Lord Ordinary reported. She claimed,—1. Preferably, the liferent of the legal interest of the price of Torrie, (after deduction of the prior heritable debts), as a surrogatum of the liferent of the lands. To this the common agent objected,—that she was not entitled to draw more of the interest of the price than corresponded to the proven rental of the

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F.

creditors, in consequence of having paid part of the composition, and being liable for the other instalments which were not yet due.

The defenders objected,—1. That the bankrupt and his cautioners had no title to pursue. 2. That neither had Taylor and others a title to insist as creditors, as the whole creditors had not concurred; and, 3. It was maintained, on the authority of the case of Deuchar and others against Watt, 15th May 1819, Fac. Coll., that the action was incompetent after the sequestration was at an end. The Lord Ordinary at first sustained the action as relevant; but he afterwards ordered informations to the Court, in respect of the above case, but which, his Lordship remarked, ‘seems to stand, in point of form, in a situation considerably different from the present.’ The Court found ‘the present action competent, and that the pursuers have a title to insist both as cautioners and creditors.’

*E. McBRAY, W. S.—J. KERMACK, W. S.—Agents.*

No. 366.

Sir J. HORN and Others, Petitioners.—*Cullen.*

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FIRST DIVISION.  
D.

*Process.*—A process of division of a commony having been brought by the petitioners, and the Lord Ordinary having remitted to a commissioner to proceed with the division, a bill of suspension and interdict was presented by Young and others against any farther steps being taken. The bill of suspension was passed, (17th May 1821), but the interdict was refused. Thereafter the petitioners prayed for warrant to discuss the reasons summarily on the bill, and for a re-

mit ob contingentiam to the process of division; which the Court granted.

WALKER, RICHARDSON, & MELVILLE, W. S.—Agents.

W. LAWRIE and Others, Petitioners.—*Forsyth*.  
J. DUNDAS, Respondent.—*Moncreiff—Rose Robinson*.

No. 367.

*Execution pending Appeal*.—The Court having refused in hoc statu to exoner and discharge Mr. Dundas from the office of trustee on the sequestrated estate of the Stirling Merchant Bank, (see No. 291), and found him liable in expences, he entered an appeal to the House of Lords. Execution pending appeal being prayed for by Lawrie, it was allowed in common form.

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H.

D. FISHER—ROBINSON & PATERSON, W. S.—Agents.

J. R. JOHNSTONE, Advocate.—*Gordon*.  
J. RITCHIE, Respondent.—*Cranstoun—Wilson*.

No. 368.

*River*.—The properties of Johnstone and of Ritchie were separated by the burn of Tillycoultry. Ritchie was infest, with parts and pertinents, and alleged that he and his predecessors had been for 150 years in the practice of taking water from the burn; and that for 30 years he had possessed a cut from it, for domestic purposes. In Johnstone's disposition, his estate was conveyed to him, 'with the water of the burn of Tillycoultry, and privilege of taking of the same, for any purpose he pleases, &c. in so far as myself am entitled to do so.' With the view of supplying a cistern for malting eight bolls of barley

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in his barn, Ritchie cut a small trench, and conveyed water from the burn by means of a roan, at each end of which he placed a stopper; and he returned any superfluous water into the burn, within the extremities of Johnstone's property. An interdict having been applied for by Johnstone against this proceeding, the inferior court refused it. But, in an advocacy, the Lord Ordinary found that Ritchie had no right to take the water in the mode which he had adopted, without the consent of Johnstone. The Court, however, found that Ritchie had a right to take the water; but remitted to the Lord Ordinary to hear parties as to the most efficient mode of preventing waste.

A. STORIE, W. S.—A. WISHART, W. S.—Agents.

No. 369.

J. BERRY, Advocate.—*Cranstoun—Thomson.*

A. MURDOCH, (HYNDE'S TRUSTEE), Respondent—*Forsyth—Greenshields—Moncreiff.*

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SECOND DIVISION.

Lord Cringletie.

B.

*Bill of Exchange.*—A promissory-note was granted by Hynde to Berry, who discounted it, and it was duly retired by Hynde. They were partners in trade; and, in an action of count and reckoning raised by the trustee on Hynde's sequestrated estate, it was alleged by him that the note had been granted to Berry without value. Berry admitted that it was an accommodation-bill, and that he had discounted it; but alleged that the accommodation was to Hynde; and that after receiving the proceeds, he had paid them to him. The inferior court decerned against Berry; but, in an advocacy, the Lord Ordinary, after remitting to an accountant to investigate the books, assolizied

him; and the Court, in the whole circumstances, holding that the written *ex facie* evidence of the note was not redargued, (by a majority), adhered.

J. MOWBRAY, W. S.—D. FISHER,—Agents.

MISS COCKBURN, Pursuer.—*Clerk—Forsyth.*  
COCKBURN'S TRUSTEES, Defenders.—*Erskine—Cockburn.*

No. 370.

*Presumed Intention.*—This was a question of presumed intention, depending for its decision on several memorials to the war-office, the relative answers, and other correspondence. Captain Cockburn, immediately before his death, was about to conclude an exchange from full to half-pay, which was afterwards, by the permission of the Commander in Chief, completed. Captain Cockburn left a trust-settlement for behoof of his four sisters, and the money due on account of the exchange was paid to the trustees. The pursuer, who was the only unmarried sister of Captain Cockburn, alleging that the exchange had been permitted to be carried into effect for her behoof exclusively, raised an action against the trustees for payment of the money received by them; but the Lord Ordinary and the Court held that it was intended for the benefit of the sisters generally; and, therefore, assolizied the trustees.

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B.

T. BAILLIE—H. DONALDSON, W. S.—Agents.

No. 371.      **A. LANDELLS and Others, Pursuers.—*Jeffrey.***  
                  **R. OGILVIE and Others, Defenders.—*Cockburn.***

Feb. 16, 1822.      Landells and others, the owners of a vessel which  
 FIRST DIVISION.      had been stranded in the harbour of Leith, brought  
 Lord Gillies.      an action against Ogilvie and others, the underwriters,  
 H.      (see No. 24), in which issues were ordered, with  
                  a view to a remit to the Jury Court. But thereafter  
                  the Court, ‘in respect the defenders offer to pay the  
                  ‘principal sum claimed, decern for the same; and re-  
                  ‘mit to the Lord Ordinary to hear parties on the  
                  ‘claim for interest and expences of process.’

INGLIS & WEIR, W. S.—J. MOWBRAY, W. S.—Agents.

No. 372.      **W. M'CREADIE, Suspender.—*Gillies.***  
                  **R. REID, (ASSIGNEE OF STEVENSON), Charger.—*For-***  
                  ***syth.***

Feb. 16, 1822.      *Writer's Hypothec.*—Stevenson was the law-agent  
 FIRST DIVISION.      of Grahame, and had a right of hypothec over his  
 Bill-Chamber.      title-deeds for a debt of £20 : 10s., contracted prior  
 Lord Meadowbank.      to his bankruptcy. M'Creadie and others, Grahame's  
 H.      trustees, being anxious to sell the bankrupt's herit-  
                  able property, Stevenson agreed to deliver the title-  
                  deeds to the purchaser, on their granting an obliga-  
                  tion to pay an account of £36 : 9s. for law-business  
                  subsequently contracted by them. The property was  
                  sold; and Stevenson having been employed to uplift the  
                  balance of the price, which, after paying the herit-  
                  able securities, amounted only to £20, he applied  
                  this sum in extinction of the account due by the  
                  bankrupt, and thereafter assigned the obligation by  
                  the trustees to Reid, who raised an action or &c.

The trustees pleaded, in defence, that they were entitled to a deduction of the £20; and that Stevenson had renounced his hypothec, on their agreeing to pay the account contracted by themselves. The inferior court decerned against them; and the Lord Ordinary refused a bill of suspension; but the Court ordered it to be passed.

W. MARTIN—D. FISHER,—Agents.

J. EWING and Others, Petitioners.—*J. Hamilton, jun.* No. 373.  
J. & W. CRAWFORD, Respondents.—

*Bankrupt.*—Decree, (in absence), recalling a se- Feb. 16, 1822.  
ques-tration of J. and W. Crawford, as not falling SECOND DIVISION.  
within the bankrupt act. F.

W. PATRICK, W. S.—

—Agents.

E. WEBSTER, Advocate.—*Clerk.* No. 374.  
D. M'INTYRE, Respondent.—*Forsyth.*

Decree, (of consent), recalling various interlocutors Feb. 16, 1822.  
pronounced in a bill of advocation of an action be- SECOND DIVISION.  
fore the Commissary-Court of Glasgow, between Bill-Chamber.  
Webster and M'Intyre, spouses. Lord Cringletie.  
B.

A. CRAWFORD, W. S.—D. FISHER,—Agents.

J. JEFFRAY, Suspender.—*Jeffrey—J. H. Robertson.* No. 375.  
BATHGATE TRUSTEES, Chargers.—*Clerk—Forsyth.*

*Suspension.*—A bond had been granted by Jeffray, Feb. 16, 1822.  
and a number of the members of a Relief congrega- SECOND DIVISION.  
tion, in favour of trustees, binding themselves to pay Bill-Chamber.  
Lord Pitmilley.  
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rateably whatever might turn out to be the balance of debt due by the congregation. A charge having been given to Jeffray on this bond for a sum allocated as his share, and a poinding having been executed, he presented a bill of suspension and interdict, on the ground, *inter alia*, that he was charged for more than what was due. The Lord Ordinary refused the bill; but as the case resolved into an accounting, the Court passed it on caution.

W. A. MARTIN, W. S.—C. STEWART,—Agents.

No. 376.

R. SCOTT, Suspender.—*Clerk—Dalzel.*

J. REID and S. JOLLY, Chargers.—*Cranstoun—Maitland.*

Feb. 16, 1822.

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Bill-Chamber.

Lord Meadowbank.

M.K.

*Suspension.*—The late W. Douglas, by a settlement, conveyed his whole property equally to all his children. In order to make up a feudal title, the eldest son, W. Douglas, was infeft on a precept of clare constat; and he thereafter disposed the property, in trust, to Reid, Jolly, and Scott, for behoof of himself, his brothers, and sisters, and the representatives of his deceased brother, Stewart Douglas, declaring ‘a majority of the trustees accepting and acting to be a quorum, and the deeds of the said quorum to be as effectual as if granted by the whole trustees;’ and power was given to them to sell. Besides being a trustee under this deed, Scott was tutor of the minor children of Stewart Douglas. The property having been sold by Reid and Jolly, without Scott’s consent, (and after Reid had agreed not to do so), Scott presented a bill of suspension and interdict, in order to prevent them from granting

a title to the purchaser, on the ground, that the sale had been effected without his consent, and to the prejudice of the children. The Lord Ordinary refused the bill; but the Court passed it.

GIBSON, CHRISTIE, & WARDLAW, W. S.—CORRIE & WELSH  
W. S.—Agents.

D. BLACK, Pursuer.—*Moncreiff—J. Wilson, jun.* No. 377.  
W. BAIRD, Defender.—*Solicitor-General—Rose Robinson.*

This was a question of fact. Black, a collector of taxes, raised action against Baird for certain alleged arrears. The defence was, payment to Russell, who was sub-collector and assistant of Black. The points in dispute were,—1. Whether Russell had authority to discharge? and, 2. Whether payment had been made to him? The Court, on the report of the Lord Ordinary, found both these facts proved; and, therefore, assoilzied Baird.

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DAVID WILSON, W. S.—T. WALKER,—Agents.

Dr. SANDERS, Pursuer.—*Jeffrey—Sandford.* No. 378.  
P. HEWAT, Defender.—*Cockburn.*

*Physicians Fees—Presumed Payment.*—Dr. Sanders, a physician, raised action against Hewat, as the representative of the late Mr. Greig, for a certain sum, as 'a fair and just remuneration for medical attendance and advice' bestowed on the deceased during six years. In defence, Hewat stated, that physicians fees were not actionable; and, at all events,

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were presumed paid. Dr. Sanders maintained, that the presumption was, in this case, obviated by the custom of Edinburgh, and by the terms of certain alleged receipts. The Lord Ordinary found, 'that the pursuer's claim must be restricted to his fees, or honoraries, and attendance upon the deceased David Greig during his deathbed illness.' To this interlocutor the Court, after allowing a diligence for recovery of the receipts, which failed, adhered.

N. W. ROBERTSON—P. HEWAT, W. S.—Agents.

No. 379.

P. REID, Pursuer.—*Jardine*.

D. SHAW, Defender.—*Fergusson*.

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*Warrandice—Eviction*.—Reid, the proprietor of a bleachfield, entered into a contract with Shaw, the tenant of a neighbouring farm, by which he obtained the privilege of carrying off all the spring-water on the farm, in any direction which he pleased, during Shaw's lease, in consideration of £4 a-year, and the use of a certain field. Having proceeded to make cuts for this purpose, a coterminous proprietor obtained an interdict against Reid, in respect he was not entitled to divert the course of the water, which had always run through part of his estate. The effect of this interdict was not to deprive Reid of the use of the water, but only to cause it to run in a particular direction. Reid alleging that the water was, from various circumstances, polluted, and rendered useless for bleaching, by flowing in this course, raised an action of damages against Shaw. But the Lord Ordinary assoilzied him, 'in respect that the

‘ pursuer has not been deprived of the water from the fields mentioned in the libel by any act or deed of the defender : that absolute warrandice is not expressed in the contract or agreement libelled on : that the said agreement has been fully implemented by the respondent : that, under it, the pursuer has obtained all that he stipulated from the defender ; and that the respondent is not responsible for the interruption of the pursuer’s operations by a third party, of whose right to interrupt them it must be presumed that both parties were aware at the date of the agreement.’ To this interlocutor the Court adhered.

W. DRYSDALE, W. S.—W. GARDNER, W. S.—Agents.

J. STEWART, Pursuer.—*Forsyth—J. Hamilton.—A. Murray, jun.* No. 380.  
M. ROSS, Defender.—*Blackwell.*

*Submission—Reduction.*—An action of damages having been raised by Ross against Stewart for verbal injury, the parties submitted it to the decision of two arbiters, with power to name an oversman. A decree was pronounced by the oversman, awarding damages, and decerning for expences, also for a sum of money to the clerk of the submission for his trouble and expence, ‘ and sums paid to the arbiters.’ Stewart having been charged on this decree, suspended, and brought an action of reduction of it on the grounds, inter alia,—1. That it was founded in falsehood, for although the witnesses appeared ex facie of the proceedings to have been sworn, yet, in fact, they had not been put on oath ; and, 2. That it was

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ultra vires of the arbiters to decern for the sums in favour of the clerk of the submission. In regard to the first of these grounds, no objection had been made by Stewart until after the date of the decree. The Lord Ordinary repelled the reasons, and assoilzied the defender; but found, 'that as the sum awarded by the oversman to the clerk to the submission included, besides the expence incurred by him, a sum as a fee to the arbiters, as paid by him, the decree-arbitral is ultra vires as to the sum so awarded to the clerk;' reserving, however, to the clerk to enforce his claim to said sum, and to Stewart his defences, as accords. To this judgment the Court adhered.

It was observed on the Bench, that it does not follow, (as was argued), that because a decree-arbitral is in part ultra vires, that it ought to be reduced in toto.

CUNNINGHAM & BELL, W. S.—W. DRYSDALE, W. S.—Agents.

No. 381. J. DAVIDSON, Pursuer.—

J. BALLINGALL, Defender.—*More.*

Feb. 21, 1822. *Expences.*—Davidson raised an action against Ballingall for payment of £53 for certain furnishings, which the latter did not deny having received, but he resisted payment, on the ground that they were exorbitantly charged. The Lord Ordinary approved of the report of a person of skill to whom the account had been remitted, by which £29 : 12 : 6 were deducted; and he decerned against the defender for the balance, and for the expences of bringing the process into Court, which he modified to three guineas; but found neither party entitled to any further expences. Bal-

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lingall reclaimed, and insisted that he was entitled to expences ; but the Court adhered.

BROWN & LAWSON, W. S.—D. BALLINGALL, W. S.—Agents.

SHARP, FAIRLIE, & Co., Pursuers.—*Cranstoun—Blackwell.*

No. 382.

H. W. GARDEN, (M'LANE'S TRUSTEE), Defender.—*Moncreiff—Brown.*

*Arrestment—Execution—Statute 1540, c. 75.*

Feb. 21, 1822.

Sharp, Fairlie, and Company, on the dependence of an action at their instance against M'Lane, before the magistrates of Glasgow, in virtue of their precept, arrested a debt due to him by William Bennet, trustee for John Crawford and Company of Port-Glasgow. Bennet having no place of residence within the jurisdiction of the magistrates, the arrestment was executed by leaving a copy for him at the counting-house of William Bennet and Company, of which he was a partner, and where he managed the estate of Crawford and Company. Having obtained decree, Sharp, Fairlie, and Company raised an action of furthcoming, in which Garden (M'Lane's trustee) stated various defences, which were repelled ; and he afterwards maintained that the arrestment was null, as it had not been executed personally nor at Bennet's dwelling-house, in terms of the statute 1540, c. 75. The inferior court having decerned in the furthcoming, Garden brought an advocacy, in which Sharp, Fairlie, and Company pleaded,—1. That the objection to the formality of the arrestment was incompetent, peremptory defences having been stated, a proof led, and an interlocutor pronounced

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on the merits before it was proponed; and, 2. That the mode of execution which had been used was sanctioned by a long and general practice in Glasgow. The Lord Ordinary, 'in respect that the 'arrestment in question was executed against William Bennet neither personally nor at his dwelling-house, but at the counting-house of Messrs. William Bennet and Company, of which he is a partner,' sustained the reasons of advocacy, and assailed Garden from the furthcoming; and the Court adhered.

J. DUNLOP, W. S.—J. CRAWFORD, W. S.—Agents.

No. 383.

J. LAIDLAW, Pursuer.—*J. McFarlan.*  
W. BAILLIE, Defender.—*L'Amy.*

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*Expences.*—Laidlaw having claimed the expences of an adjudication led by him against certain lands purchased by Baillie from Gordon's trustee, (see No. 136), which was opposed by Baillie, on the ground, that the adjudication had been unnecessary, the Lord Ordinary found him entitled to the expences, 'in respect that Mr. Laidlaw's adjudication had 'been raised before the action of multiplepoinding had been brought, and was the proper 'measure to render the real burden, which had been 'transferred to him, effectual upon the lands, and 'farther proceedings in this adjudication were rendered unnecessary, solely by Mr. Laidlaw having 'been preferred in the multiplepoinding, by which 'full payment of his debt was secured.' To this judgment the Court adhered.

J. LAIDLAW, W. S.—D. CLYNE,—Agents.

Mrs. S. M'ALISTER and HUSBAND, (with concurrence  
of His MAJESTY'S ADVOCATE), Complainers.—  
*Cunninghame.*

No. 384.

J. and J. ORR and Others, Respondents.—

*Fraudulent Bankruptcy.*—A summary petition and complaint was presented by Mrs. M'Alister and husband, with concurrence of the Lord Advocate, stating, that James and John Orr, the tenants of a farm belonging to Mrs. M'Alister, under a lease which expired at Martinmas 1821, had, with the view of defeating the hypothec for the year's rent due at that term, privately thrashed out all their crop, built up the straw in stacks, for the purpose of deception, and, with the assistance of certain other persons, had, on the 5th November, during the night-time, carried off and secreted the whole live-stock, the corn, and the implements of husbandry; and concluding that all the parties should be ordained to appear in presence of the Court for examination, and be found guilty of fraudulent bankruptcy, and subjected to the pains of the act 1696, c. 5. The Court, considering the petition competent, and the conclusions relevant, granted warrant for apprehending all the parties.\*

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W. PATRICK, W. S.—Agent.

A. SHARP, Pursuer.—*Moncreiff—Christison.*  
POLLOCK'S TRUSTEES, Defenders.—*Murray—A.*  
*Wood.*

No. 385.

*Recompense.*—This was an action by Sharp against the trustees of the late Allan Pollock, in which

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M'K.

\* This case was afterwards extrajudicially settled.



he claimed 1,000 guineas, as a remuneration for coming, during the late war with America, to this country, where he alleged he had remained for several years, exclusively occupied in the management of a certain business confided to him by Pollock, and for payment of the expences incurred on his journey, and while residing here. The chief point at issue was, Whether, in point of fact, Sharp had come and been engaged exclusively on Pollock's business? The Lord Ordinary, being satisfied that he had been induced to come partly on his own private affairs, allowed him £500 as a recompense, sustained some of his claims for expences, and rejected others. To this interlocutor the Court adhered.

R. STRACHAN, W. S.—R. COWAN, W. S.—Agents.

No. 386.

G. CRICHTON, Pursuer.—*Moncreiff—Ivory.*  
W. GILBERTSON, Defender.—*Cranstoun—Green-*  
*shields.*

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Lord Pitmilley.

B.

The Court had remitted to the Lord Ordinary, with instructions to find that the defender must either implement an obligation of warrandice of certain heritable subjects, and pay the rents for a particular period, or repay the price, with interest. The sole dispute now was, Whether the Lord Ordinary had correctly applied the judgment of the Court, in decerning for a specific sum of rent? And the Court having found that he had, adhered to his interlocutor.

J. GEMMEL,—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

J. TAAFFE and MANDATORY, Advocators.—*Forsyth* No. 387.

—*Hope.*

Mrs. TAAFFE and W. MOFFAT, Respondents.—*Clerk*

—*Skene—J. Henderson, jun.*

*Mandatory—Expences—Advocation.*—An action Feb. 22, 1822.  
of adherence having been raised by Mrs. Taaffe before  
the Commissaries against Mr. Taaffe, it was sisted till  
an action of declarator of nullity of marriage at his in- FIRST DIVISION.  
stance was disposed of. Mr. Moffat acted as soli- Bill-Chamber.  
citor for Mrs. Taaffe, who resided in England. On Lords Craigie and  
an application in name of Mrs. Taaffe, the Commis- Alloway.  
saries granted an interim-decree for a certain sum H.  
against Taaffe, in order to enable her to carry on  
her defence, which was paid; and thereafter de-  
cerned in her favour and that of Moffat for another  
sum, as expences disbursed in the action. Against  
this decree Taaffe reclaimed, on the allegation that  
Mrs. Taaffe had withdrawn appearance: that, at all  
events, being resident abroad, a mandate from her  
was necessary; and praying that all the interlocu-  
tors and decrees injurious to his interests should be  
recalled, and Moffat ordained to repay the sum  
which he had received. The Commissaries having  
adhered, he presented a bill of advocation, which  
was refused by the Lord Ordinary as incompetent.  
But the Court, after superseding the case till a  
mandate was produced from Mrs. Taaffe, altered  
the Lord Ordinary's interlocutor, 'in respect no  
' mandate has been produced, and no compar-  
' ance is now made on the part of the respondent,  
' Mrs. Taaffe;' and remitted to the Commissaries,  
' with instructions to recal their interlocutors in so

‘ far as they award payment of any sums of money  
 ‘ to the said respondent, in name of expences or  
 ‘ otherwise : find the respondent liable in expences  
 ‘ of process, and allow Mr. William Moffat to print  
 ‘ and box a minute relative to the petitioner’s claim  
 ‘ against him for expences.’

Against this interlocutor Moffat presented a petition in his own name, in which he admitted that Mrs. Taaffe had now withdrawn her authority to him to appear for her; but contended, that he was entitled to the benefit of the decree in his name, as agent, for the expences disbursed by him when duly authorized. The Court adhered ‘ to the interlocutor reclaimed against,  
 ‘ so far as it is thereby found that a mandate by Mrs.  
 ‘ Taaffe or Colebrooke to the petitioner was necessary, and to that extent refuse the prayer of the  
 ‘ petition; but alter the said interlocutor, to the  
 ‘ effect of finding the petitioner entitled to the  
 ‘ sum in name of expences awarded to him by  
 ‘ the interlocutor of the Commissaries of 14th April  
 ‘ 1820; and remit to the Lord Ordinary to refuse  
 ‘ the bill to that extent.’

CAMPBELL & MACK, W. S.—W. MOFFAT,—Agents.

No. 388. J. M’GUFFOG and M’NEEL, and M’KENNAL, Pursuers.  
 —Baird.

J. V. AGNEW, Defender.—P. Robertson.

Feb. 22, 1822.

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 Lord Alloway.  
 S.

*Tack—Clause.*—Agnew granted to P. M’Guffog a lease for 19 years from 1806 of certain parts of the lands of Slochabbert and Barryerrick, excluding assignees, but with a power of subsetting, he continuing liable for the rent. It was provided, ‘ that the

‘ tack shall immediately cease and come to an end  
‘ upon the bankruptcy of the tenant ;’ but in the e-  
vent of the lands being subset, ‘ that the bankruptcy  
‘ of the principal tenant is to be of no effect against  
‘ bona fide subtenants of above a year’s standing ;’  
and also, ‘ that if at any time the tenant shall re-  
‘ quire a set of farm-houses on that part of the farm  
‘ called Barryerrick, the proprietor shall receive from  
‘ the tenant seven and a half per cent. for what mo-  
‘ ney he lays out on them, and shall give home-grown  
‘ wood for them, without charging interest for the  
‘ value of it.’ M’Guffog subset the lands, in 1807, at  
a surplus rent, which, with the subtacks, he, in 1812,  
assigned to M’Neel and M’Kennal, who intimated  
the assignation. Thereafter M’Guffog died insol-  
vent, and his son, James, acquired right to the prin-  
cipal lease. The subtenant in Barryerrick was Wil-  
liam Davidson, who also possessed the adjoining farm  
of Blacknook, belonging to Agnew, on which there  
was a steading of houses. In 1816, Davidson, in  
virtue of a power to that effect, renounced Black-  
nook, and claimed from Agnew a steading on Barry-  
errick, in terms of the above clause. This being re-  
fused, he gave up that farm, which was thrown into  
the hands of the assignees, who subset it annually by  
public roup, at a considerable loss. They then rais-  
ed an action of declarator, the chief object of which  
was to have it found, that in consequence of Agnew’s  
refusal to erect a steading on the lands, they were  
entitled to retention of the rent till he implemented  
his obligation. Agnew stated, in defence,—1. That  
the pursuers had no title to found on the clause, as  
(1.) the lease excluded assignees ; and (2.) as it was  
put an end to, except as to the subtacks, by M’Guf-

fog being bankrupt. 2. That he had offered to Davidson, the subtenant, the use of the steading on the farm of Blacknook, which he had agreed to accept in place of one on Barryerrick. The Lord Ordinary found, that James M'Guffog, as heir of his father, and M'Neel and M'Kennal, as the assignees of the latter, having acquired right to the whole of the surplus rents, they 'have a sufficient right and interest to insist upon all the clauses of the lease being fulfilled, by which either the surplus rent might be increased or the payment thereof secured;' and that they were entitled to retention or deduction of rent, on account of Agnew not having implemented his obligation; but, at the same time, allowed him to condescend as to the alleged transaction with Davidson; and the Court adhered.

J. R. SKINNER, W. S.—W. POLLOCK,—Agents.

No. 389. J. MORTON, TRUSTEE for G. TAYLOR's Creditors,  
Pursuer.—*Moncreiff—Walker.*

Lady M. MONTGOMERIE and HUSBAND, Defenders.  
—*Cranstoun—Jameson.*

Feb. 22, 1822.

FIRST DIVISION.

Lord Gillies.

H.

*Landlord and Tenant—Tack.*—Lady M. Montgomerie let to George and Peter Taylor certain farms for 21 years from Martinmas 1811. The lease excluded assignees and subtenants, and contained the following provision in regard to buildings.—'And the said tacksmen hereby bind and oblige themselves and their foresaids, during the two first years of their lease, to lay out, at the sight of the masters, the sum of £1,100 sterling in building and furnishing a steading of slated houses, &c.—' the site and

‘ dimensions of which to be condescended on by the  
‘ factors ; which sum the masters are to repay the  
‘ said tacksmen, or their foresaids, at the issue of  
‘ this lease.’ Peter Taylor did not sign the lease ;  
but George Taylor entered into possession, and  
expended nearly £600 in building a farm-house  
and offices. In 1818, and before the buildings were  
completed, he became bankrupt, and fled the country.  
Decree of removal was thereafter pronounced against  
him, on the ground of desertion ; and the lands were  
let to a new tenant. The trustee for Taylor’s cre-  
ditors brought an action of repetition of the sums  
expended on the buildings against Lady Mont-  
gomerie, alleging that she was thereby lucrata.  
She pleaded, in defence,—1. That as Taylor had  
violated his contract, the creditors could have no  
claim against her, although it could be shown  
that she was a gainer. 2. That, in point of fact,  
she would ultimately be a great loser. The in-  
ferior court found, that the value of the houses  
was stipulated by the tack to be repayable at the  
expiry of the lease ; and ‘ though this, in strict-  
‘ ness, implies the fulfilment by the tenant of his  
‘ part of the contract throughout its whole dura-  
‘ tion, wherein he has failed, still it would be too se-  
‘ vere an interpretation to hold the landlords entitled  
‘ to reap an actual profit from the tenants outlays  
‘ on buildings, on the sudden termination of the lease  
‘ by a casus improvisus, not contemplated by either  
‘ party ; and that the defenders must be accountable  
‘ to the trustee for George Taylor’s creditors in  
‘ quantum lucrati by the buildings erected ;’ and de-  
cree was thereafter pronounced for a certain sum. But,  
in an advocacy, the Lord Ordinary found, ‘ that

‘ there is no evidence of Lady Montgomerie being  
 ‘ lucrata in consequence of the erection of the build-  
 ‘ ings, coupled with the desertion of the farm; on the  
 ‘ contrary, that it appears from the offers, that the  
 ‘ farm, with the buildings, cannot now be let at a rent  
 ‘ equal to that which was payable by the former  
 ‘ tenant for the last sixteen years of his lease;’ and  
 his Lordship, therefore, assoilzied the defenders. The  
 Court, after ordering minutes ‘ respecting the result  
 ‘ of the extinction of the late George Taylor’s tack  
 ‘ of the lands in question, so far as concerns the in-  
 ‘ terest of the landlord,’ (by a majority), altered; but  
 afterwards their Lordships (also by a majority) re-  
 turned to the Lord Ordinary’s interlocutor.

WALKER, RICHARDSON, & MELVILLE, W. S.—RUSSELL, ANDERSON,  
 & TOD, W. S.—Agents.

No. 390.

Mrs. MOLLISON.—*Moncreiff—Cunninghame.*

J. BUCHANAN and OTHERS.—*Cranstoun—Green-  
 shields—Blackwell.*

Feb. 22, 1822.

SECOND DIVISION.  
 Lord Pitmilley.  
 M’K.

*Presumed Intention—Donation or Anticipated Pay-  
 ment.*—The late Mr. Rowan had, by penurious habits,  
 accumulated a considerable fortune; and, in 1805, he  
 and his wife made a mutual trust-settlement, by  
 which, under reservation of power to alter and to dis-  
 pose of his property during his life, he conveyed to  
 her, after his death, the fee of all his heritable and  
 one-half of his moveable property, and the liferent of  
 the other half; while she, on the other hand, re-  
 nounced all her legal claims as his widow. The fee  
 of the liferented half he provided to the family of his  
 niece, who was married to Mr. Buchanan. A few

weeks before Mr. Rowan's death, and with the knowledge of his wife, he sent bills amounting to £4,270, blank indorsed, to Mr. Buchanan. These bills were carried and delivered to Mr. Buchanan by a Mr. Crawford, (who was the nephew of Mrs. Rowan), without being accompanied with any written communication from Mr. Rowan. Buchanan and his family immediately addressed and sent a letter to Mr. Rowan, in these words.—‘ With grateful hearts we, &c., acknowledge to have received from you, (here the bills were specified), making together the sum of £4,270, for which sum we become bound to pay interest when required, agreeable to your desire.’ It did not appear that at this time Buchanan or his family knew of the provisions in their favour in the trust-deed. Mr. and Mrs. Rowan having died, a dispute arose between Mr. Buchanan and Mrs. Molison, (who was the executor of Mrs. Rowan), as to whether these bills were to be held as having been given in pure donation, or as an anticipated payment of the provisions in the trust-deed? In a multipointing raised by the trustees, the Lord Ordinary caused Mr. Buchanan and Mr. Crawford (who was on special grounds inadmissible as a witness) to be judicially examined, in order to ascertain Mr. Rowan's intentions, and what passed when the bills were delivered; and he thereafter reported the case. The Court (by a majority) found the bills were to be considered as an anticipated payment of the provisions.

The majority of their Lordships rested their opinion chiefly on the obligation to pay interest, and on some other minor circumstances disclosed in the declarations. The minority, on the other hand, agreed in an opinion expressed by the Lord Ordinary in an interlocutor,



which he recalled, with a view of reporting the case, that as it was not pretended that 'when Mr. Buchanan and his family received the four bills from Mr. J. Crawford, and granted their acknowledgment for these bills, they were in the knowledge of Mr. Rowan's settlement, and of their eventual interest under it, and granted their acknowledgment with reference to the settlement: And as the presumption of law with regard to Mr. Rowan, arising from the undisputed circumstances of the case, and from the writings produced, is, that he did not intend to give the bills to Mr. Buchanan and his family, either in advance of what he had bequeathed to them by the settlement, or as a loan; but that he gave the bills as a donation during his lifetime: So the bills cannot be imputed in part payment of the provisions to which Mr. Buchanan and his family have right by the settlement of Mr. Rowan; but they are entitled to these provisions over and above the amount of the bills.'

J. THORBURN—H. J. ROLLO, W. S.—Agents.

No. 391.

Mrs. BELL.—*Murray—Ro. Bell.*

A. GARDNER'S TRUSTEES.—*Moncreiff—Buchanan—J. Henderson, jun.*

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SECOND DIVISION.

Lord Pitmilly.

M'K.

*Relief among Executors.*—On the death of Mrs. Anderson, part of her moveable succession was taken up via facti by her son, and the other part remained in bonis defuncti. The son having died, the sister of Mrs. Anderson obtained herself confirmed as executor of the latter part; and Mr. Gardner took up the former, as executor of the son. Mrs. Anderson's debts and funeral expences were paid by her sister after the son's death; and an action was raised a-

gainst Gardner, as representing the son, for relief pro rata. The question was, Whether these expences should form a burden exclusively on that part of the succession which had fallen to the sister of Mrs. Anderson, or should fall pro rata on that which Mr. Gardner had acquired through the son? The plea of Mr. Gardner was, that there were two successions, that of Mrs. Anderson, and that of her son; and that he had right to the latter, and could not be burdened with the debts of the former. The Lord Ordinary found, that the debts formed a burden exclusively on the sister's part. But the Court altered this judgment; and held, that each part of the succession must be burdened with the debts pro rata.

T. FERGUSON, W. S.—W. GARDNER, W. S.—Agents.

A. M'LEISH.—*Bell—L' Amy.*

No. 392.

W. M'NAUGHT.—*Moncreiff—D. M'Farlane.*

Competing.

*Bankrupt—Trustee—Personal Objection.*—A competition having arisen between M'Naught and M'Leish for the office of trustee on the sequestrated estate of James Steele, the Court remitted in common form to the Sheriff, who reported that there was a personal objection to the eligibility of M'Naught, (which had been taken after the vote), in respect that, at the date of the election, he was trustee on the estate of Blair, who had been engaged in a joint adventure with Steele, and between whom accounts were unsettled. To this objection M'Naught answered, that he had now resigned the office of trustee, and that a balance had been struck in a submission between

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S.

Blair and Steele, which settled their accounts; but of this there was no evidence. The Court ordered a new election.

W. GUTHRIE—GREIG & PEDDIE, W. S.—Agents.

No. 393.

A. THOMSON, Pursuer.—

A. RAMSAY, Defender.—*Baird*.

Feb. 23, 1822.

FIRST DIVISION.

S.

*Cessio Bonorum*.—The Court had found Thomson entitled to the benefit of a cessio, on his lodging a disposition of his effects, and making oath in terms of the act of sederunt. Thereafter Ramsay, one of his creditors, having applied to the Court to order the pursuer (who was unmarried) to assign part of his half-pay as a pursuer in the navy, which he had stated in his condescendence at £50 a-year, their Lordships found, ‘that before extract of the decreet of cessio, the pursuer must lodge in process a special assignation in favour of his creditors of £20 a-year out of his half-pay.’

—A. HAY, W. S.—Agents.

No. 394.

THE INCORPORATION OF COOPERS OF GLASGOW,  
Advocators.—*Blackwell*.

W. GRANT, Respondent.—*Rutherford*.

Feb. 23, 1822.

FIRST DIVISION.

Bill-Chamber.

Lord Meadowbank.

H.

*Burgh Royal*—Stat. 52. Geo. III, c. 68.—The Incorporation of Coopers of Glasgow presented a summary petition and complaint to the magistrates against Grant, on the ground of violation of their privileges, by exercising the trade of a cooper within the burgh, without being a freeman. Grant pleaded,

that he was a King's freeman, under the 189th section of 52. Geo. III, c. 68, having been on actual service with the first regiment of Lanarkshire local militia for four years. This regiment had been in-rolled for the upper ward of Lanarkshire, and had never been out of the county, but had only been on the usual permanent duty for three years in Glasgow, and one year in Hamilton. The magistrates, in respect of the decision in Kirkwood against the Tailors of Canongate, 19th January 1811, Fac. Coll., held that Grant had been on actual service, in terms of the statute ; and, therefore, dismissed the complaint. The Lord Ordinary refused a bill of advocacy ; but the Court unanimously remitted to the magistrates, ' with instructions to alter their interlocutors, and decern in terms of the original complaint.'

J. & W. JOLLIE, W. S.—MACMILLAN & GRANT, W. S.—Agents.

S. BOYD, Petitioner.—*Fergusson*.

No. 895.

A. HUNTER, Respondent.—*Cathcart*.

*Freehold Qualification—Member of Parliament.*— Feb. 23, 18-2.

A claim was made by Boyd to be admitted on the roll of freeholders of the county of Ayr, as publicly infest, inter alia, in the lands of Carne, of old extent, holding of the crown. He produced a crown-charter of resignation and sasine, and an extract retour of the service of one of his ancestors, in order to instruct the valuation of the old extent of Carne. It was objected to this claim, ' that the lands of Carne are not contained in the descriptive clause of the retour.' In point of fact, the word Carne was there written

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M.K.

Earne; but in all the other clauses, and particularly in the valent clause, it was written Carne. The freeholders sustained the objection, and rejected the claim. But the Court being satisfied that this was merely a clerical error, and that there was no dispute as to the identity of the lands, ordered the freeholders to admit Boyd on the roll.

J. TAIT, jun. W. S.—HUNTER, CAMPBELL, & CATHCART, W. S.—  
Agents.

No. 396. J. SCOTT and Others, Suspenders.—*Ro. Thomson.*  
D. BURNS, Charger.—*More.*

Feb. 26, 1822.

FIRST DIVISION.

Bill-Chamber.

Lord Kinnedder.  
S.

*Bill of Exchange.*—Scott and others, accepters of a bill, presented a bill of suspension against a charge by Burns, an indorsee, on the ground that, although ex facie indorsee, he was, in fact, drawer, and that the bill had been granted under an obligation to hold an accounting with them relative to various transactions, of which this bill formed a part. Several letters were produced to instruct these allegations; but the Lord Ordinary refused the bill, ‘in respect that the suspenders decline to establish by the oath of the charger that the latter is a bona fide indorsee.’ The Court, however, (of consent), passed it.

J. MACARA, W. S.—G. WILSON,—Agents.

G. BELL and Others, (SIMSON'S TRUSTEES), Pursuers.—*L'Amv.* No. 397.

R. HENDERSON, Defender.—*M'Farlane—Hopa.*

*Tack.*—This was a case of circumstances, and no point of law occurred. In an action of damages by General Simson against his tenant, Henderson, for failing to implement the conditions of a lease, the sheriff, in January 1805, remitted to certain persons to inspect the farm, and ascertain the damages. They all agreed in reporting that damages were due, but they differed materially as to their amount. The sheriff decerned for a proportion of them. In an advocacy by the tenant, the Court, in November 1805, ordered a new report; but no steps having been taken for many years, owing to the lapse of time, no report could be obtained. The Lord Ordinary afterwards decerned for an average of the damages fixed under the remit of the sheriff; and the Court adhered.

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FIRST DIVISION.

Lord Gillies.

H.

YOUNG, AYTOUN, & RUTHERFORD, W. S.—W. CLARK, W. S.—  
Agents.

G. TURNBULL, Suspender.—*Moncreiff—Matheson.* No. 398.  
W. M'KIE, Charger.—*Cuninghame.*

*Society—Bill of Exchange—Mandate.*—M'Kie charged Turnbull, as a partner of Turnbull and Leask, to pay a bill accepted by Taylor per procura-  
tion of the company. Turnbull suspended, on the ground that Taylor had no authority to sign such a bill; but it was established that he had acted as ma-

Feb. 26, 1822.

FIRST DIVISION.

Lord Alloway.

D.

nager for the company, and transacted their whole business. 'The Lord Ordinary repelled the reasons of suspension, 'in respect that Taylor alone conducted the business which was carried on under the 'firm of Turnbull and Leask at Inverness, neither 'of whom resided at the place; and it is not denied 'that the goods furnished fell under the description 'of the business carried on in their name as haberdashers; and in respect that the suspender and his 'partner are entitled to, and did actually lay hold of 'the whole goods, to the exclusion of any claim of 'Taylor's private creditors.' Turnbull then called for production of the bill, which was long prescribed, and had been protested, but which it appeared had been lost after the suspension was brought. The Court, after allowing a diligence for its recovery, which failed, adhered to the Lord Ordinary's interlocutor, being satisfied that the bill had been granted, and that Turnbull was liable for the debt, even independent of the bill.

J. M'DONELL, W. S.—Æ. M'BEAN, W. S.—Agents.

No. 399.

ALEXANDER M'DOWALL, Pursuer.—*Baird*.  
ANDREW M'DOWALL, Defender.—*Greenshields*.

Feb. 26, 1822.

SECOND DIVISION.  
B.

*Execution pending Appeal*.—The case, No. 278, having been appealed, the Court (of consent) granted warrant for interim-execution pending appeal, on caution.

J. R. SKINNER, W. S.—J. WEMYSS, W. S.—Agents.

J. VERT, Advocate.—*Forsyth.*  
J. AFFLECK, Respondent.—*Cockburn.*

No. 400.

*Common Property.*—In a dispute between these parties relative to the gable between their respective tenements, the inferior court had found it mutual, and the Lord Ordinary refused a bill of advocation; but the Court (of consent) passed it.

Feb. 26, 1822.

SECOND DIVISION.  
Bill-Chamber.  
Lord Kinnedder.  
F.

P. CROOKS, W. S.—H. DONALDSON, W. S.—Agents.

A. MAJORIBANKS and Others, Petitioners.—*Forsyth.* No. 401.

*Trust.*—John Newlands of Jamaica, by a deed of settlement in the English form, bequeathed considerable funds to certain trustees, who were named, and to the minister of Bathgate for the time, for the purpose of accumulating the principal for ten years, and afterwards employing the interest in the erection and support of schools in the parish of Bathgate, in such a situation, and under such management, as the trustees should appoint. The funds having increased to a large amount, and several of the trustees having died, the survivors, together with the minister of the parish, applied to the Court to appoint additional trustees; and they produced lists, containing the names of the representatives of the original trustees, and certain official persons whom they wished to be nominated, and on whom, and their successors, the administration of the trust should be permanently devolved. The Court refused the petition ‘in hoc statu.’

Feb. 27, 1822.

FIRST DIVISION.  
D.

SCOTT & FINLAY, W. S.—Agents.



No. 402.

J. GRAHAM, Pursuer.—*Forsyth—Tawse.*A. HILL RENNIE, Defender.—*Moncreiff—J. Tait.*

Feb. 27, 1882.

FIRST DIVISION.

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D.

*Commonly—Servitude.*—Graham having brought an action of declarator and of division of a moss, to a third of which he claimed right, and also concluding for damages for having been illegally deprived of the possession, Rennie's defences were,—That the subject was a part and pertinent of his estate, by which it was surrounded; and that the right of the pursuer and his predecessors was confined to a mere servitude of digging peats, which had come to an end in consequence of the moss being exhausted. The Lord Ordinary, after finding 'that the title-deeds of the parties are not 'exclusive of nor inconsistent with the plea maintained by the defender, and that the respective rights and interests of the parties must be regulated by the possession which has taken place 'for the last forty years,' appointed Graham to give in a condescendence 'of the acts of possession which 'he alleges to have had of the moss in question for 'the last forty years, and of the facts he offers to 'prove in support of them.' Against this interlocutor he reclaimed, on the ground, that any proof which was to take place should be before answer. But the Court refused the petition.

C. TAWSE, W. S.—TAIT, YOUNG, &amp; LAWRIE, W. S.—Agents.

No. 403.

Mrs. HADDEN, Pursuer.—*Clerk—More.*  
J. BARR, Defender.—*Moncreiff—Rutherford.*

*Process—Minor—Tutor and Curator.*—Barr having obtained a service before the magistrates of Edinburgh as tutor-at-law to two infants, Mrs. Hadden, their mother, before the brief was retoured to Chancery, presented a bill of advocation of the service, which was passed in absence, and afterwards brought a reduction of it, on the grounds,—1. That Barr was ineligible to the office of tutor, as he was not subject to the jurisdiction of the Court, being domiciled in England. 2. That his brother, whom he offered as his cautioner, was objectionable, from being his partner in a mercantile business; and, 3. That both the company, and Barr and his brother individually, were in possession of part of the minors funds, for which, if the service were sustained, it would be difficult to make them account. Barr pleaded, in defence, that the advocation was incompetent after the verdict of the jury, and the judge had interponed his authority: that the debt had been lately paid to a factor loco tutoris appointed by the Court, whose receipt he produced; and that his residing in England did not disqualify him from the office of tutor, as he would find unexceptionable cautioners, subject to the jurisdiction of the Court. The actions having been reported by the Lord Ordinary, the Court unanimously repelled the defences, and decerned in the reduction.

Feb. 27, 1822.

FIRST DIVISION,  
Lord Gillies.  
D.

Some of the Judges considered the advocation incompetent; but a decision on the point was unnecessary, in consequence of the judgment in the reduction.

J. M'ANDREW—W. RENNY, W. S.—Agents.

No. 404. J. JEFFREY and Others, Pursuers.—*Jeffrey—R. Bell.*  
A. BLAIR, Defender.—*Cockburn—Maitland.*

Feb. 27, 1822. *Cautioner.*—John Jeffrey granted a bill for £120  
FIRST DIVISION. to James Jeffrey, ‘for behoof of his sister, Isobel, be-  
Lord Alloway. ‘ing the balance of the legacy left her by my uncle.’  
H. On this bill James Jeffrey raised an action against  
John, who defended himself on the ground that ‘Isobel  
‘Jeffrey is not in a state to give her consent to the pay-  
‘ment of this money;’ but stated, ‘that if the pursuer,  
‘who is Isobel Jeffrey’s brother, will procure him-  
‘self nominated curator bonis to his sister, and will  
‘find sufficient security, the money will be instantly  
‘paid; otherwise the defender is not in safety to pay.’  
The Lord Ordinary decerned against John; and James  
having threatened an inhibition, Mr. Blair granted  
a letter in these terms.—‘Whereas Mr. John Jeffrey,  
‘writer in Edinburgh, is at present prosecuted in the  
‘Court of Session at the instance of Mr. James Jef-  
‘frey, mason, for payment of £120, and interest  
‘thereon, contained in the said John Jeffrey’s pro-  
‘missory-note; I hereby oblige myself and my heirs  
‘to see the said sum paid within ten days after a  
‘final decret in said process.’ The Lord Ordina-  
ry’s interlocutor was recalled by the Court, who  
remitted to him to inquire as to the state of Isobel’s  
mind. It having been found that she was quite un-  
fit to be entrusted with the management of her own  
affairs, appearance was made in the action by her  
only other brothers, Robert and George, who were  
sisted as pursuers with James, and decree, as libelled,  
pronounced in their favour. John Jeffrey becoming  
bankrupt, an action was raised against Mr. Blair

on his cautionary obligation by James Jeffrey, with consent of Robert and George. The defence was, that the guarantee libelled on fell by the appearance of new parties subsequent to the period at which it was granted; and that a guarantee in favour of James Jeffrey as an individual cannot be construed into an obligation in favour of James, Robert, and George Jeffrey; but, at all events, James could not recover sums decerned for in favour of him and his brothers conjunctly. The Lord Ordinary and the Court sustained the defences.

WM. MARTIN—A. BLAIR, W. S.—Agents.

J. BROWN, Advocator,—*Miller*.

T. PEACOCK, Respondent.—*Maitland*.

No. 405.

**Tack.**—Peacock's lease of an arable farm belonging to Brown expiring at Martinmas 1819 and Whitsunday 1820, he obtained a renewal of it for one year, by a missive, (dated 9th February 1820), in which he bound himself 'to flit and remove at the end of the year without any warning or process of removal.' Brown having afterwards, without warning, applied to the sheriff for warrant of ejection against Peacock at Whitsunday 1821, he resisted it on the grounds,—1. That he had never received any warning to remove. 2. That he had got a promise from Brown to grant him a new lease; and, 3. That he had managed the farm on this understanding. The sheriff sustained the defences; but, in an advocacy, the Lord Ordinary, 'in respect of the date and particular tenor of the missive in question,' remitted to him to decern in the ejection.

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Lord Gillies.

S

tion ; and the Court refused a petition without answers. A minute of reference to Brown's oath, that he had promised a lease for another year, was afterwards sustained as competent ; but he having deponed negative, the Court adhered.

J. & A. SMITH, W. S.—GORDON & WILSON, W. S.—Agents.

No. 406. MABERLY & Co. Pursuers.—*Clerk—Cranstoun—Jeffrey—Moncreiff.*  
BANK of SCOTLAND, Defender.—*Cockburn—Walker.*

Feb. 27, 1822.

SECOND DIVISION. *Bank—Debtor and Creditor—Equitable Debt.*  
An ordinary action was raised against the Bank of Lord Cringletie.  
F.

Edinburgh, on the allegation, that their agent at Aberdeen having acquired certain notes issued by the Bank, amounting to £270, had, in order to transmit them safely, cut them into two halves,—that a parcel, containing one set of these halves, was regularly booked and sent by the mail-coach, but had been stolen,—and that the other parcel, containing the other set of the halves, had been forwarded by post, and received. The conclusions of the action were, that the Bank should be ordained to pay £270, ' upon the pursuers producing to the ' Bank the halves of the said bank-notes now in their ' possession, and finding indemnity or caution to ' guard them against any possible claim from the ' holder of the halves of the said bank-notes which ' are amissing, and in such terms as shall be sp- ' proved of by our said Lords, and the pursuers be- ' ing at the expence which may be incurred by the ' said Bank in reissuing new notes to the extent of

'the said sum of £270.' The notes had been cut through the middle from top to bottom; and the action was founded on the left hand halves, on which there was no signature. The claim was made in equity; and a condescendence was given in, offering to prove all the allegations on which the action rested. The defence was, that the Bank was not bound to acknowledge the half notes founded on, more especially as the notes had been purposely mutilated by Maberly and Company themselves.

The Lord Ordinary reported the case; and the Court (by a majority) sustained the defences, and assoilzied the Bank.

It was observed, that as Maberly and Company had been guilty of a tortious act in cutting the notes of the Bank, by which it had suffered an injury, they could not maintain a plea in equity.

Ro. BURNET, W. S.—H. DAVIDSON, W. S.—Agents.

MABERLY & Co., Pursuers.—*Clerk—Cranstoun—* No. 407.  
*Jeffrey—Moncreiff.*

COMMERCIAL BANKING COMPANY, Defenders.—*More.*

The nature and decision of this case were the same as the preceding one. Feb. 27, 1822.

Ro. BURNET, W. S.—J. A. CAMPBELL, W. S.—Agents.

SECOND DIVISION.  
Lord Cringletie.  
F.

No. 408.

Mrs. GRAHAME.—*Hope*.C. BANNERMAN and Others.—*Buchanan*.

Competing.

Feb. 28, 1822.

FIRST DIVISION.

Bill-Chamber.

Lord Kinnedder.

D.

*Executor—Confirmation.*—By a contract of marriage between John Ewen and Mrs. Janet Middleton, all the property, heritable and moveable, belonging to him at his death, was destined to the children of the marriage. After Ewen's death, Mrs. Grahame, his only child, applied to the Commissaries to be declared executrix-dative qua next of kin to her father, which Bannerman and others opposed, and claimed confirmation, as having been nominated executors in a trust-settlement granted by the deceased in their favour, for charitable purposes. The Commissaries having preferred their claim, Mrs. Grahame presented a bill of advocacy, and executed a summons of reduction of the trust-deed, as being in fraud of the contract of marriage, and ultra vires of the testator, as executed on death-bed, and as not being written on the proper stamp. The Lord Ordinary refused the bill, 'in respect it is admitted that the deceased John Ewen, the complainer's father, executed a trust-deed, by which the trustees therein named were appointed his executors; and in respect that these trustees, until the deed of nomination shall be set aside, are entitled to the office of executors, as executors-dative;' and the Court adhered.

BROWN &amp; LAWSON, W. S.—

—Agents.

**P. ANDERSON, Petitioner.—*Graham Bell.***

**No. 409.**

*Factor Loco Tutoris—Minor.*—The Court refused a petition by Anderson, the factor loco tutoris for minors, praying for authority to allow a deduction from the rents of certain heritable property belonging to them, as absolutely necessary, in the present state of the times; to enable the tenants to keep possession.

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**FIRST DIVISION.  
D.**

**J. ANDERSON, W. S.—Agent.**

**H. BAILLIE and Others, Suspenders.—*Moncreiff—Buchanan.***  
**J. MORRISON and the Reverend C. FRASER, Char-**  
**gers.—*Sir J. Connell—Gordon—Mackenzie.***

**No. 410.**

*Patron—Papist—Statute 10. Anne, c. 13—Title to Pursue.*—Fraser of Lovat, who was a minor, a Roman Catholic, and residing abroad, with consent of his curators, granted a commission in favour of one of them, Mr. Morrison, 'to name and present fit and qualified persons, in terms of law, to serve the cure as ministers' of certain parishes in this country of which he was patron. All the curators of Lovat were Roman Catholics, except Mr. Morrison, who duly qualified himself as commissioner to present. The church and parish of Kiltarlity becoming vacant, he, in virtue of his commission, granted a presentation in favour of Mr. Colin Fraser, (a regularly licensed preacher of the Church of Scotland), which he having accepted, and taken the oaths to government, the presbytery proceeded, according to the rules of the church, to ordain him. Before the church forms had been com-

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**FIRST DIVISION.  
Bill-Chamber.  
Lord Balmuto.  
D.**



pleted, Baillie and others, designing themselves 'elders, heritors, members of the kirk-session, and parishioners,' presented a bill of suspension and interdict against the proceedings of the presbytery, on the ground, that the presentation was null and void, on the statute 10. Queen Anne, c. 18. The Lord Ordinary having passed the bill, and granted an interdict, Morrison and Fraser reclaimed, on the grounds, —1. That it was incompetent, by suspension and interdict, to interfere with the proceedings of the presbytery in the settlement of a minister. 2. That Baillie and others had no title to pursue; and, 3. That a presentation by the qualified commissioner of a Catholic patron was valid under the statute. The Court ordered intimation to be made to the Officers of State, who, however, did not appear; and their Lordships afterwards, on advising memorials, and a hearing in presence, and on the report of Lord Kinnedder, as Probationer, repelled the objection to the competency, as the question regarded the civil right of patronage; but, 'in respect that the suspenders have no title to object, alter the interlocutor reclaimed against, and remit to the Lord Ordinary to refuse the bill of suspension, and recall the interdict.'

M'QUEEN & M'INTOSH, W. S.—J. MORRISON, W. S.—Agents.

No. 411.

J. ROBERTSON and Others, Pursuers,—*Gordon*.  
T. MEGGET and Others, Defenders.—*Buchanan*.

Feb. 28, 1822.

FIRST DIVISION.  
Lord Alloway.  
H.

*Title to Pursue—Substitution.*—Alexander Bell conveyed certain property to his daughters, Mrs. Murray and Elizabeth Bell, under condition, that,

failing heirs of their bodies, they should be obliged to convey the whole property, heritable and moveable, belonging to them at death, to the children of two other daughters, Mrs. Sanderson and Mrs. Robertson, 'in such proportions as they should think fit;' or failing such division, that it should belong to those children equally. Elizabeth Bell died unmarried, after conveying her property as directed by her father's settlement. Mrs. Murray having no children, made over a large part of her property to Megget, on receiving from him a bond of annuity payable to herself during her life, and thereafter to Mrs. Megget and others, the descendants of Mrs. Sanderson. The children of Mrs. Robertson having brought an action of reduction of this deed, as granted in violation of Bell's settlement, the defence was, that they had no interest to pursue, Mrs. Murray having, by a previous mortis causa deed, conveyed all her property to the defenders, under payment of £40 to the children of Mrs. Robertson. The Lord Ordinary sustained the defences; and afterwards repelled a claim for the £40, 'as there were no media concludendi in the summons on which that demand could be made;' and the Court adhered.

GREIG & PEDDIE, W. S.—T. MEGGET, W. S.—Agents.

J. KIRKWOOD, Pursuer.—*Clerk—M<sup>r</sup> Farlane.*

A. WILSON, Defender.—*Jeffrey—Jameson.*

No. 412.

*Debtor and Creditor.*—This was a question of fact. It was an action for £64, as the balance of £550, for which Kirkwood alleged that he had contracted to execute the carpenter work of a house built by

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Lord Alloway.

D.

Wilson. The defence was, that Kirkwood had agreed to perform the work for £450; and, therefore, that no balance was due. The Lord Ordinary, after allowing a diligence for recovery of writings and the examination of havers, decerned in terms of the libel, and refused a proof that £450 was the offer made by Kirkwood. The Court altered this interlocutor, and remitted, with instructions to allow the proof, or to send the case to the Jury Court.

TOD & WRIGHT, W. S.—G. M'DOWALL,—Agents.

No. 413.

J. URE, Pursuer.—*Blackwell.*

Rev. T. BURNS, Defender.—*Cranstoun—Ro. Thomson.*

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SECOND DIVISION.  
Lord Pitmilley.  
F.

*Debtor and Creditor.*—Ure raised an action against the representatives of J. Burns, on the passive titles, for £797 : 17 : 7, which resolved into a count and reckoning. The Lord Ordinary having remitted the case to an accountant, who reported that the defender was creditor instead of debtor, assoilzied him; and the Court adhered.

A. PEARSON, W. S.—J. MOWBRAY, W. S.—Agents.

No. 414.

W. STIRLING GLASS, Pursuer.—*Greenshields—Cockburn.*

G. PENTLAND and Others, Defenders.—*Clerk—Fulleton—Jameson.*

March 1, 1822.

FIRST DIVISION.  
D.

*Cessio Bonorum.*—The Court refused Glass decree in a cessio bonorum, in respect that his condescendence was too vague, and that, in the whole circum-

stances of the case, it did not appear that he had given a satisfactory account of his funds.

CAMPBELL & ARNOTT, W. S.—W. DOUGLAS, W. S.—Agents.

G. WALDIE, Advocate.—*Wood.*

No. 415.

DUKE of ROXBURGHE, Respondent.—*Mackenzie—H.  
J. Robertson.*

*Reparation—Implied Obligation.*—In 1809, the Duke of Roxburghe obtained a perpetual interdict, prohibiting Waldie from deepening a part of the Tweed opposite to the Roxburghe estate. In 1817, the Duke of Roxburghe presented a petition and complaint to the sheriff against Mr. Waldie, on the ground that he had, 'by means of his servants, or others in his employ, or acting under authority derived from him,' violated the interdict; and prayed that he should be ordained to restore the channel of the river to its former state. From the proof, it appeared, that the violation of the interdict had been committed under the directions of Waldie's miller, at a time when Waldie was in England, who had repeatedly forbidden his servants to deepen the river at the forbidden point; and that one of these servants, who had been engaged in a former breach of the interdict, had also been concerned in this offence. The inferior court decerned against Waldie; and, in an advocacy, the Lord Ordinary adhered. But the Court (by a majority) altered this judgment, and assoilzied Waldie.

March 1, 1822.

SECOND DIVISION.

Lord Pitmilley.

R.

The majority of their Lordships were of opinion, that Waldie could not be made responsible for an illegal act of his servants done in his absence, and which

he had not only not sanctioned, but had expressly prohibited.

A. DOUGLAS, W. S.—MACKENZIE & INNES, W. S.—Agents.

No. 416. Mrs. BAILLIE and Others, Petitioners.—*Moncreiff—Skene.*

JEAN WADDELL and Others, Respondents.—*Cockburn—Bruce.*

March 1, 1822.

SECOND DIVISION.  
B.

*Process—Summary Complaint—Jurisdiction.*—After Mrs. Baillie and her sister had been served heirs-portioners of W. Waddell, a brief was taken out, addressed to the macers, by Jean Waddell, to be served heir of line to him. During the dependence of the service, a petition and complaint was presented to the Court of Session by Mrs. Baillie and the representatives of her sister (who was now dead) against Jean Waddell and others, accusing them of having been guilty of subornation of perjury and violation of the parish records. The Court (22d December 1820) dismissed the complaint as incompetent, reserving to apply to the macers. A petition and complaint was then presented to that Court, charging the same offences, and concluding for damages and expences. It was objected, that the petition was not competent without the concurrence of the Lord Advocate. The macers made avizandum with the proceedings to the Court, who sustained the competency, and remitted to the macers to receive condescendences of the facts alleged, and to proceed as they should see just.

D. McLEAN, W. S.—TAIT & BRUCE, W. S.—Agents.

Lieutenant C. BARR, Pursuer.—*Brownlee*.  
M. PATERSON and Others, Defenders.—*Currie*.

No. 417.

*Cessio Bonorum*.—The Court granted decree of March 2, 1822.  
cessio in favour of Barr, who was a lieutenant in the FIRST DIVISION.  
army on half-pay, on his assigning to his creditors S.  
£20 a-year out of his half-pay. He was married,  
but had no family, and his debts were about £92.

G. LANG—C. GORDON,—Agents.

A. SMITH, Suspender.—*Fullerton—Whigham*.  
J. GRIERSON and W. BELL, Chargers.—*A. Gillies*.

No. 418.

*Expences*.—In this case, the sole question was, March 2, 1822.  
Whether the suspender ought, in the circumstances, FIRST DIVISION.  
to be liable for the expences of process? The decision Lord Gillies.  
did not depend on any general point; and the Court S.  
adhered to the interlocutor of the Lord Ordinary, de-  
cerning for the expences.

A. GOLDIE, W. S.—CARNEGIE & SHEPHERD, W. S.—Agents.

J. SKENE, Suspender.—*Gordon—Cockburn*.  
J. and S. MABERLY, Chargers.—*Jeffrey—Moncreiff*  
—*Skene*.

No. 419.

*Nuisance—Tack*.—J. and S. Maberly were assign- March 2, 1822.  
ees of a tack, granted by Skene for 51 years from FIRST DIVISION.  
1794, of certain lands in the neighbourhood of Aber- Bill-Chamber.  
deen, which had from an early period of the lease Lord Meadowbank.  
been used as a bleachfield, without interruption  
from the landlord. Messrs. Maberly having after-

wards begun to erect buildings for the purpose of converting into soap the residuum of the bleaching materials, (which a late statute rendered it illegal to sell), Skene presented a bill of suspension and interdict, on the grounds,—1. That the proposed operations were contrary to the nature of the lease, which he alleged had been granted purely for the purposes of agriculture; and, 2. That, when completed, they would be a nuisance. The Lord Ordinary having granted an interim interdict, afterwards reported the case; and the Court, being satisfied that the lease could not now be considered agricultural, recalled the interdict, but passed the bill of suspension to try the question of nuisance,

F. WILSON, W. S.—R. BURNETT, W. S.—Agents.

No. 420.

J. HARRIS, Advocate.—*Greenshields—Jeffrey.*  
CHURCHILL & PRICE, Respondents.—*Forsyth—*  
*Sandford.*

March 2, 1822.

SECOND DIVISION.  
Lord Cringletie.  
B.

*General Discharge—Proof—Process.*—J. and D. Harris received, in consideration of a certain composition, a discharge from their creditors ‘ of all debts ‘ and sums of money due by them to us previously ‘ to the said 9th day of December 1811, in whatever ‘ manner of way the said debts and sums of money ‘ may be vouched or constituted.’ Churchill and Price had ranked for a debt of £39 : 12 : 6, received the composition, and signed the discharge. In 1815, they raised an action before the magistrates of Glasgow against J. Harris, as representing the company, in which they concluded for £32 : 19s., as the value of a parcel of goods delivered to J. and D. Harris in

July 1811, which they alleged that company had promised to return, but had failed to do so. The defence was founded on the general discharge. The magistrates allowed a proof of the allegation in the libel. In an advocacy by Harris, the Lord Ordinary limited the proof to writ or oath ; but the Court remitted to him to receive a condescendence. Thereafter his Lordship assoilzied Harris, with full expences, in respect that, although ' satisfied that the goods were ' delivered to Messrs. Harris, and equally so that no ' composition was paid on the amount, yet as the ' discharge granted by the pursuers (Churchill and ' Price) is so broadly expressed as to discharge all ' debts prior to 9th December 1811, &c. he cannot ' know what passed, when this was granted, to re- ' serve out of it the present claim.' To this judgment, on a petition by Churchill and Company, and answers by Harris, the Court (by a majority) adhered ; but found the former liable in expences only from the date of the remit to the Lord Ordinary. Against this interlocutor, so far as it limited the liability of Churchill and Price for expences, Harris presented a petition ; which was refused as incompetent.

J. GEMMELL—D. FISHER,—Agents,

J. M'GROUTHER and Others, Pursuers.—*Jardine.*

No. 421.

Dr. HILL, Defender.—*D. M'Farlane.*

*Trust—Discharge and Exoneration.*—Stewart March 2, 1822.  
having become insolvent, conveyed his estates to  
M'Grouther and others, as trustees, for payment of  
his debts. After his death, Hill was appointed fac-  
SECOND DIVISION,  
Lord Cringletie.  
F.



tor loco tutoris of his children ; and the trustees raised a process of multiplepoinding and exoneration. The Lord Ordinary remitted their accounts to an accountant, and ordained them to denude themselves of certain outstanding debts due to the trust-estate, in favour of the factor. Against the latter part of the judgment they presented a petition, on the ground, that they were not bound to do so till they were discharged ; but the Court adhered, on caution being found to relieve them of all claims beyond the amount of the trust-funds in their hands.

LYON & BLACKADDER—GREIG & PEDDIE, W. S.—Agents

No. 422. JEAN BOYLE and HUSBAND, Pursuers.—  
H. CRAWFORD and Others, Defenders.—*Fullerton.*

March 5, 1822.

FIRST DIVISION.

Lord Gillies.

S.

*Husband and Wife—Homologation.*—Jean Boyle was proprietrix of certain coal, which, in the absence of her husband, William Mathie, (who had emigrated to North America, leaving her destitute), she, in 1788, conveyed by a disposition to Caldwell, for £80, (in whose right Crawford and others now were), but ‘ reserving power and faculty in favour of the said William Mathie, my husband, if, upon the knowledge of these presents, he chooses to buy back the said just and equal sixth part of the said coal, &c.; in which event, he was bound to repay the £30, and the sixth part of the charges that should be incurred. Boyle joined her husband in America in 1785 ; and, in 1818, they brought an action of reduction of the disposition and of count and reckoning against Crawford and others, on the ground, inter alia, that it was null and void, having been granted by a married woman without the con-

sent of her husband. The Lord Ordinary found, ' that the disposition under reduction having been ' granted by the pursuer, Jean Boyle, in the absence ' and without the consent of her husband, was fundi- ' tus null and void ; and, therefore, reduces, decerns, ' and declares against the defenders, conform to the ' conclusions of the libel.' To this judgment the Court adhered.

W. PATRICK, W. S.—J. MEEK, W. S.—Agents.

G. BRIDGES and SPOUSE, Pursuers.—*Mensies.*  
J. ELDER and SPOUSE, Defenders.—

No. 423.

*Jurisdiction.*—Bridges and Elder, who were coterminous proprietors, in right of their wives, of certain heritable property, having got involved in a dispute relative to their marches, the former presented a petition to the sheriff, praying him to find that he had right to a particular piece of ground, of which Elder had taken possession, and to interdict and prohibit Elder from disturbing him in the enjoyment of it. The sheriff at first dismissed the action as incompetent; but he afterwards found, ' that, ex facie of the titles, (of both parties), ' the right of the petitioner (Bridges) to possess the ' ground in dispute is clear, whereas the right of ' the respondents is expressly excluded : that, in such ' circumstances, no possession had by the respondents of the ground in question can entitle them, or ' either of them, to a possessory judgment, such possession not being warranted by any title produced ; ' and he, therefore, ordained them to cede possession to Bridges and spouse. In an advocacy, the Lord Ordinary found that the sheriff had no jurisdiction in the question ; and his Lordship afterwards refused to

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FIRST DIVISION.  
Lords Gillies and  
Meadowbank.  
D.

allow Bridges and spouse to repeat an action of declarator in the process. The Court refused a petition, without answers.

J. YOUNG, W. S.—A. PEARSON, W. S.—Agents,

No. 424.

J. LANG, Pursuer.—*Matheson*.

J. CAMPBELL, Defender.—*Brownlee*.

March 5, 1822.

FIRST DIVISION.  
S.

*Cessio Bonorum*.—In this case, the Court adhered to their former interlocutor, refusing Lang decree in a cessio bonorum, (see No. 27), though he had been imprisoned since the 3d of November 1820, their Lordships being satisfied that he had still a part of his funds concealed from his creditors.

J. M'DONELL, W. S.—T. M'GOET, W. S.—Agents.

No. 425.

W. GIBSON, Pursuer.—*Greenshields*.

D. STEWART, Defender.—*Cuninghame*.

March 5, 1822.

SECOND DIVISION.  
Lord Glenlee.  
F.

*Title to Pursue—Society—Process*.—In 1811, during the existence of a partnership between Gibson and Broadfoot, an action was raised by ' William Gibson, ' merchant in Liverpool, in the county of Lancaster, ' for himself, and as attorney for, and copartner in ' trade of, William Broadfoot, merchant in Charles- ' town, South Carolina, in the United States of ' America, carrying on trade in Liverpool under the ' firm of William Gibson and Company; and by ' Thomas Moffat, writer in Edinburgh, the manda- ' tory of the said William Gibson;' and the summons concluded for payment of certain sums ' to the ' pursuers and their mandatory.' The action having

fallen asleep, it was wakened in 1817. In the meanwhile, however, the copartnery between Broadfoot and Gibson had been dissolved. The defender objected to the instance and conclusions, in respect of the dissolution of the company; and the Lord Ordinary sustained the defence. Against this judgment the Court refused a petition, without answers.

The Lord Ordinary, in a note, issued before pronouncing absolvitor, stated, that it is 'incumbent on the pursuer to explain distinctly whether his former partner, William Broadfoot, has only retired from the concern of William Gibson and Company, or whether there has been a dissolution of the concern. If the former is the case, (i. e.) if Broadfoot was settled with for his share of the company's stock and effects, so that the whole right to the goods on hand and debts due to the company devolved on the other partner, the defender's objection against the process going on appears to be groundless. If, on the other hand, there was a dissolution of the concern, which implies that the goods on hand were to be divided among the partners, or sold for their mutual behoof, and that the debts due to the company were to be collected for their mutual behoof, it appears incumbent on the pursuer to shew, that he is the person authorized to collect the debts, and to carry on a process raised originally for behoof of the company while it was going on.'

J. MACKENZIE,—R. COWAN,—W. S.—Agents.

J. MILL, Pursuer.—*Forsyth.*

No. 426.

MAGISTRATES OF MONTROSE, Defenders.—*Ivory.*

March 5, 1822.

*Process.*—An action of reduction having been raised by Mill, of an act of Convention of the Royal

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Lord Cringletie.  
F.

Burghs of Scotland, and of a royal warrant by the King in Council, creating a new set of the burgh of Montrose, the defences were, that 'the pursuer has no title to pursue the present action.' After a debate, the Lord Ordinary pronounced this interlocutor.—  
 'Repels the objections to the pursuer's title to insist in the action; and makes great avizandum with the writs produced by the pursuer for satisfying the production, to the reduction libelled, and with the reasons of reduction.' Of this interlocutor the Magistrates complained to the Court, on the ground, that, in consequence of great avizandum having been made, they were deprived of the right of submitting the decision on the title to review. The Court remitted to the Lord Ordinary to recal that part of his interlocutor; and to hear parties farther in the cause.

P. CROOKS—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

No. 427.

R. JOHNSTONE, Pursuer.—*Jeffrey—Dundas.*  
 DUGALD and LAIRD, Defenders.—*Cunninghame.*

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SECOND DIVISION.  
 F.

*Cessio Bonorum.*—The Court refused the pursuer the benefit of the cessio bonorum, as he had been guilty of fraud, by granting bills in name of a company, of which he was the managing partner, for his own purposes, appropriating to himself money paid to him for behoof of the company, and keeping false books.

GREIG & PEDDIE, W. S.—J. THORBURN,—Agents.

J. A. URE, Pursuer.—*Forsyth—D. Dickson.*  
E. GILCHRIST and Others, Defenders.—*Clerk—Ro.  
Bell.*

No. 428.

*Cessio Bonorum*.—Decree of cessio was here refused, in respect the debts of the pursuer had been contracted by discounting accommodation-bills, with names on them, which he represented as real, when, in fact, he knew they were fictitious.

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F.

J. SWAN, W. S.—HUNTER, CAMPBELL, & CATHCART, W. S.—  
Agents.

R. Erskine, Petitioner.—*A. Gillies.*

No. 429.

*Process*.—The Court dispensed with the induciæ in a summons of wakening, in an adjudication by Erskine, in order that he might secure his pari passu preference with other adjudging creditors.

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H.

A. M'LEAN, W. S.—Agent.

G. RAINNIE, Suspender.—

No. 430.

J. D. MILNE, Charger.—*D. M'Farlane.*

*Bill of Exchange*.—Milne was indorsee on a bill of exchange, of which M'Kenzie was drawer, and George and William Rainnie were accepters. Having given a charge to George Rainnie, he suspended, on the ground, that Milne had refused an offer of payment of the bill and expences, made at his desire, by a third party, Mr. Megget, on receiving an assignation to the bill and diligence. Milne alleged that he was not bound to grant an assignation in

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Lord Alloway.  
S.

favour of a third party, nowise interested, and that by so doing he might injure M'Kenzie and the joint acceptor, William Rainnie. The Lord Ordinary found, 'in respect that Mr. Megget has offered to pay the bill charged on, upon receiving an assignation to the debt, that the charger is not entitled to refuse payment of this debt from Mr. Megget, with the interest due thereon, and the expences incurred at the time the offer was made, and to assign the same, and the diligence thereon, but without recourse upon him;' and the Court adhered.

GREIG & FERRIE, W. S.—T. SIME, W. S.—Agents.

**No. 431.** J. CUNINGHAME, Petitioner.—*Moncreiff*—R. Bell.  
J. & G. DICKSON, Respondents.—Bell.

**March 7, 1822.** *Expences.*—Decree finding Cuninghame liable for the expences incurred by Dicksons, his creditors, in opposing his discharge under a sequestration. (See No. 179).  
**FIRST DIVISION.**  
H.

D. GREIG, W. S.—J. STUART, W. S.—Agents.

**No. 432.** W. A. H. LE NEVE and Others, Pursuers.—Jameson  
—A. Gillies.

TRUSTEES of EDINBURGH and LONDON SHIPPING  
COMPANY, Defenders.—Jeffrey—More—Boswell.

**March 7, 1822.** *Reparation—Statute 53. Geo. III; c. 159—Collision of Ships.*—The brig Wells having been run down, while lying at anchor, during the night, off Inchkeith, in the Frith of Forth, by the Sprightly, belonging to the Edinburgh and London Shipping Company, the owners of the Wells and her cargo brought  
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Lord Gillies.  
S.

an action against the Company before the Court of Admiralty for reparation of the loss. After a voluminous proof had been adduced, the Judge-Admiral found, ' that the collision of the Sprightly with the Wells, by which the latter was sunk, arose from ' carelessness in the master and ship's company of ' the Sprightly, and the want of that due attention ' and precaution which was necessary for their own ' preservation and that of other vessels;' and, therefore, in terms of the above statute, decreed for the value of the Wells and her cargo, against the Company, as the owners. In a suspension, the Court, (on the report of the Lord Ordinary), after finding ' that the decision of the present question between the parties depends upon the various degrees of precaution which, according to maritime custom, ought to be taken by vessels in the relative situation which the Sprightly and the Wells bore to each other when the accident happened,' remitted the case to the Admiral commanding on the station. He reported, ' that blame was attachable to both vessels,—to the Wells for not having kept a light in her binnacle, or one in a lanthorn, in readiness to be shewn to vessels passing near her, particularly as she was lying in a fair way; but that much more blame was imputable to the Sprightly for not having kept a better look-out in such a fair way, where vessels frequently anchor, to stop tide; also for not having put the helm hard down, instead of hard up, when she saw the Wells; for if she had put in stays, she would either have avoided her altogether, or would have so much deadened or lost her way, that if they had come in contact, the concussion could not have been of seri-



'ous consequences ; but by putting her helm hard a-weather, she thereby neared the Wells, and her velocity at the same time increasing, (by the act of bearing away), the concussion, therefore, became much greater and more dangerous.' In respect of this report, the Court found the Shipping Company liable only for two-thirds of the damage.

W. SMITH—D. HORNE, W. S.—Agents.

No. 433. C. ALEXANDER and Others, Complainers.—*Blackwell.*

G. BROWN, Respondent.—*Cunninghame—Shaw Stewart.*

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*Member of Parliament.*—Brown, a merchant in Glasgow, was, in 1793, inrolled as a freeholder of Renfrewshire, on the lands of Capelrig, as in right of his wife. In 1816, Brown and his wife conveyed all and whole these lands to the Glasgow Bank by an ex facie absolute and irredeemable disposition, containing an assignation to the maills and duties, and a procuratory of resignation and precept of sasine. The Bank was base infest. Brown afterwards, on the day previous to the Michaelmas Head Court for 1820, obtained from the Bank a back-bond, which declared that the disposition had been granted only in security and relief of such debts as he might incur to the Bank, and contained an obligation to redispone the lands, on payment of these debts, at any time prior to a sale. In this deed there was no obligation by the Bank

\* This case was decided on 15th February, but was, by accident, omitted in its proper place.

not to execute the procuratory of resignation, or confirm the base infeftment. At the meeting of the freeholders, Alexander and others moved that Brown's name should be expunged from the roll, in respect of the alteration of circumstances. But the freeholders having refused to do so, they presented a petition and complaint, on the grounds,—1. That Brown was entirely divested of all right in the lands. 2. That the back-bond did not reinvest him, but was granted merely for a political purpose. 3. That, at any rate, his right was defeasible by the Bank. The Court, however, holding the disposition to be sufficiently qualified by the back-bond, and being satisfied that the Bank held the lands only in security of debt, and that Brown had hitherto exercised all the rights of a proprietor, by uplifting and discharging the rents, dismissed the complaint, with expences.

A. PEARSON, W. S.—W. PATRICK, W. S.—Agents.

TOD and WRIGHT, Pursuers.—*Clerk—M<sup>r</sup> Farlane.*  
 WILSON and M<sup>r</sup> LELLAN, Defenders.—*Moncreiff—*  
*Rutherford.*

No. 434.

*Writer's Hypothec.*—Hyde raised an action against Wilson and M<sup>r</sup> Lelland, in which Tod and Wright were employed as agents for him. The Lord Ordinary pronounced an interlocutor, ordaining the defenders to produce evidence of a fact alleged by them, on which they raised a defence. They failed to do so; and after the term was circumduced, an intimation was sent to Tod and Wright that the action had been submitted to arbiters. This submission had been concealed from Tod and Wright, who al-

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Lord Gillies.

D.

leged that it had been entered into fraudulently, for the purpose of defeating their right to decree for expences; and they contended, that they were entitled to carry on the action, to the effect of getting decree for the expences. The Lord Ordinary found ‘Messrs. Tod and Wright entitled to insist in the action, to the effect of shewing that expences would have been found due by the defenders, if the case had been proceeded in;’ and the Court adhered, in respect of the particular circumstances in this case, and that the course of proceeding adopted by the petitioners (Wilson and M’Lellan) indicates mala fides, and a purpose of evading the claim of the respondents.’ The Court afterwards refused a petition, without answers.

TOD & WRIGHT, W. S.—MACMILLAN & GRANT, W. S.—Agents.

No. 435.

J. M’LEAN, Advocate.—

R. HAMILTON, Respondent.—*Baird*.

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FIRST DIVISION.  
Lord Alloway.  
D.

*Debtor and Creditor—Pactum Illicitum.*—M’Lean and Hamilton having brought actions against each other, which were conjoined, and which resolved into an accounting, the Lord Ordinary, in an advocacy, assoilzied M’Lean from Hamilton’s action, on the ground of pactum illicitum. After this judgment was final, M’Lean prayed for decree in his action for £40. Hamilton objected, that MacLean, prior to the absolvitor, was truly debtor, and that if decree were given to him, this would enable him to profit by the pactum illicitum. The Lord Ordinary decerned against him, ‘in respect of the final interlocutors assoilzieing the advo-

‘ cator, M’Lean, from the conclusions of the ori-  
 ‘ ginal action at Hamilton’s instance against him,  
 ‘ upon the ground of pactum illicitum ; and that the  
 ‘ counter action at M’Lean’s instance, for payment of  
 ‘ the sum of £40, as the amount of an account at-  
 ‘ tested by Hamilton as due to M’Lean, and inte-  
 ‘ rest thereof, was conjoined with the other process,  
 ‘ and remained still undisposed of ;’ and the Court  
 adhered.

A. CRAUFURD, W. S.—DONALDSON & RAMSAY, W. S.—Agents.

W. KEITH and Others, Petitioners.—*Cranstoun—A. Wood.* No. 436,

J. and G. TAYLORS, Respondents.—*Ro. Bell.*

*Execution pending Appeal—Expences.*—On the March 7, 1822.  
 8th of June last, (See No. 67), the Court adhered to  
 the Lord Ordinary’s interlocutor decerning against  
 Taylor for a sum of money. By that interlocu-  
 tor, his Lordship had found expences due, appoint-  
 ed an account to be given in, and remitted it, when  
 lodged, to the auditor of Court, to be taxed. Be-  
 fore the account was sent to the auditor, Taylors en-  
 tered an appeal to the House of Lords, and served  
 it on Keith and others. The latter thereupon appli-  
 ed to the Court to grant execution pending appeal,  
 for the principal sum ; and, in reference to the ex-  
 pences, they prayed their Lordships ‘ to authorize  
 ‘ the Lord Ordinary to proceed in the ascertain-  
 ‘ ment of the said expences, and thereafter to report  
 ‘ to your Lordships, that you may resume consider-  
 ‘ ation hereof, and award execution in terms of the  
 ‘ said statute, or to give the petitioners such other

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 B.

relief in the premises as to your Lordships shall 'seem fit.' This prayer was objected to as incompetent, in respect of the appeal; but the Court remitted to the auditor to tax the accounts, and to report.

W. MOLLE, W. S.—A. SWINTON, W. S.—J. MORRISON, W. S.—  
Agents.

No. 437, G. KERR and Others, Suspenders.—*Skene*,  
Sir W. C. FAIRLIE, Charger.—

March 7, 1822.

SECOND DIVISION.

Lord Cringletie,

B.

*Insurance—Proof.*—In an action raised by Sir W. C. Fairlie, for the value of a vessel belonging to him, which Kerr and others had insured from Troon to Bristol, and which had been lost off the island of Sanda, they alleged deviation from the course of the voyage. This not having been instructed, the Admiral decerned against them. In a suspension, the Lord Ordinary, after ordering a condescendence by Kerr and others, remitted the case to the Jury Court, where a verdict was returned, finding that the vessel sailed on the voyage insured, and that she was lost in the course of that voyage. Kerr and others then applied to the Jury Court for a new trial, on the grounds, 1. That the verdict was contrary to evidence; and, 2. That the onus probandi had been irregularly laid upon them, seeing that their defence was, that the vessel did not sail on the voyage insured, and, consequently, that the onus of proving that she had done so lay on Sir W. C. Fairlie. The Jury Court refused the new trial: and when the verdict came to be applied in the Court of Session, Kerr and others again urged the latter objection; but the Lord Ordinary

repelled it, in respect, 1. That the fact of the vessel having sailed on the voyage insured had never been formerly disputed; and, 2. That, at all events, the verdict proved the fact. The Court refused a petition, without answers.

MACMILLAN & GRANT, W. S.—J. GEMMELL—Agents.

D. C. BUCHANAN, Petitioner.—*Greenshields*.

No. 438.

R. and A. POLLOCK, Respondents.—

*Arrestment*.—Decree ordaining an arrestment to be recalled to the extent of £18,000, in respect of consignation under a judicial order.

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SECOND DIVISION.

M.K.

G. DUNLOP, W. S.—R. COWAN, W. S.—Agents.

The LORD ADVOCATE, Complainer.—*Solicitor-General*  
—*Hope*.

No. 439.

D. PRENTICE, Respondent.—*Cranstoun—Murray*.

*Contempt of Court*.—A few days after Mr. Prentice had been convicted of a contempt of Court by the Second Division, and ordered to find security for his good behaviour, (but which had not yet been done), the Lord Advocate presented a petition and complaint against him to both Divisions, charging him with ‘having wickedly and maliciously composed or published a false or slanderous representation of the above-mentioned proceedings,’—‘calculated and intended to libel and defame the Right Honourable the Lord Justice-Clerk, as President of the Second Division of the Court, and to bring into contempt and hatred the dignity of the Supreme Court, and

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B.

‘ the administration of justice therein.’ Prentice pleaded various defences ; but the Court, in the whole circumstances of the case, found it unnecessary to pronounce any decision on them, and dismissed the complaint.

A. ROLLAND, W. S.—C. J. F. ORR, W. S.—Agents.

No. 440. J. GORDON, Advocate.—*Clerk—Jeffrey—Cunninghame*  
—*P. Robertson.*  
Æ. FALCONER, Respondent.—*Moncreiff—Rutherford.*

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Lord Alloway.

D.

*Landlord and Tenant.*—Falconer obtained a lease of a small farm belonging to Gordon, which adjoined another extensive farm held by him from Lord Cawdor. Gordon presented a petition to the sheriff, alleging that Falconer had carried off the crop and fodder raised on his farm to the other one, and praying to ordain him to bring them back. Falconer resisted this, on the ground that it was part of his agreement with Gordon that the two farms should be managed jointly, and by means of the steading on the larger, there not being a sufficient one on the smaller farm. The sheriff refused the petition ; and, in an advocacy, the Lord Ordinary, on advising a voluminous correspondence, found the agreement proved ; and that ‘ although no tenant is entitled to carry ‘ off his crop to another farm, by which means the ‘ landlord might not only be deprived of his hypothec, ‘ but the right of having the fodder consumed upon ‘ the farm might be disappointed ; yet this rule could ‘ only apply where there were means, by a proper ‘ farm-steading, of manufacturing the grain, and by ‘ proper offices of consuming the fodder upon the

‘ farm; and, therefore, in the particular circumstances  
 ‘ of this case, remits simpliciter to the sheriff.’ To  
 this judgment the Court adhered.

J. S. ROBERTSON, W. S.—E. M’BEAN, W. S.—Agents.

**THE COUNTESS DOWAGER OF HADINTON and HUSBAND,** Petitioners.—*Clerk—Fullerton.* No. 441.

**T. RICHARDSON and Others,** Respondents.—*Solicitor—General—Moncreiff.*

*Loosing of Arrestment.*—On the dependence of an action raised by Richardson and others against the Countess of Hadinton, as representing her father, Sir C. Gascoigne, on the passive titles, they arrested certain funds belonging to her. The Court having, on the 6th March 1821, assoilzied her from the action, Richardson and others entered an appeal to the House of Lords; and afterwards executed two new arrestments of certain other funds. The Countess of Hadinton and husband applied to the Court for recall of all the arrestments, on the grounds,—1. That they were nimious and oppressive. 2. That the dependence on which the first was used had fallen. 3. That those used after the final decret were incompetent; and, 4. On certain objections to the execution. The Court, while they unanimously held that the dependence continued during the appeal, and that the arrestments were competent, recalled, on equitable considerations, those used after the final decret of absolvitor.

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 D.

R. HOTCHKIS, W. S.—M’KENZIE & SHARP, W. S.—Agents.



No 442.

M. BAILLIE, Pursuer.—*R. Bell.*  
H. MURDOCH, Defender.—*Hunter.*

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Lord Cringletie.

F,

*Title to Pursue—Process.*—Baillie raised an action of reduction of the defender's titles to an heritable subject, as flowing a non habente potestatem, and founded on a contract of marriage, and a retour of her general service, under which she alleged she had right to the fee of the lands. The Lord Ordinary ordained the defender to satisfy the production, and appointed the pursuer 'to produce the antenuptial contract of marriage, and general retour libelled on.' She produced the retour, and a sasine on the marriage-contract, but not the latter, which she said was amissing. The defender contended that the contract itself ought to be produced, as, 1. It was necessary ad fundandam litem: 2. That the order for production was final, and must be obtempered; and, 3. That the sasine and retour were not sufficient to constitute a title to pursue. The Lord Ordinary sustained the pursuer's title, being of opinion 'that the general service of the pursuer is a sufficient title to insist in the action, and to call for production of the papers sought to be produced.' The Court refused a petition, without answers.

J. LAWSON, W. S.—HUNTER, CAMPBELL, & CATHCART, W. S.—  
Agents.

W. LAING, Petitioner.—*Rutherford*.  
EARL and COUNTESS of STRATHMORE and MANDATORY,  
Respondents.—

No. 443.

*Process*.—The Lord Ordinary having refused to repon Laing against a decree of reduction, pronounced in respect of non-production of certain writings, ordered under certification, as he had no power to do so, the Court recalled it.

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Lord Alloway.  
D.

A. STEELE, W. S.—J. HAMILTON, W. S.—Agents.

J. SUTHERLAND, Petitioner.—*Cuninghame*.

No. 444.

*Cessio Bonorum—Liberation*.—The estates of Sutherland were sequestrated under the bankrupt-statute, and he afterwards, on the 5th of March, obtained decree in a process of cessio bonorum, brought with concurrence of his trustee; but it not being possible to report the oath, or to return the executed disposition omnium bonorum, before the rising of the Court, (he being imprisoned in Nairn), their Lordships granted warrant for his interim liberation on caution,

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FIRST DIVISION,  
S.

Æ. M'BEAN, W. S.—Agent.

JANET CAMERON, Pursuer.—*Hope*,  
R. M. H. M'NIELL, Defender.—*Keay*.

No. 445.

*Process*.—Janet Cameron having raised action against M'Niell, in which she designed herself as his wife, for the arrears of a bond of annuity, the Lord Ordinary, after a reference to the pursuer's oath of alleged payments, pronounced interim-decree for

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S.

a certain sum, 'in respect that the reference to the  
 ' pursuer's oath was found competent only in so far  
 ' as the defender thereby offered to instruct certain  
 ' payments to account of the annuity, and that, at all  
 ' events, the sum decerned for under the interim-de-  
 ' cree is due, independent altogether of these alleged  
 ' payments, referred to the pursuer's oath.' In a re-  
 claiming petition, M'Niell maintained,—1. That no  
 decree could go out against him in the action at the  
 pursuer's instance, in which she was designed as his  
 wife, she having established no right to that charac-  
 ter. 2. That the interim-decree was incompetent, no  
 debt being admitted; and, 3. He prayed the Court  
 to order the designation which the pursuer had as-  
 sumed to be expunged from the record. The Court  
 refused the petition.

D. M'LEAN, W. S.—D. STEWART,—Agents.

No. 446.

MARGARET M'GILLIVRAY, Pursuer.—  
 J. GRANT, Defender.—*Currie*.

March 9, 1822.

FIRST DIVISION.  
 Lord Alloway.

*Expences*.—In this case there was no general  
 point. The Lord Ordinary having repelled the rea-  
 sons of a suspension brought by Grant, and found  
 him liable in expences, he contended, that in conse-  
 quence of the conduct of the charger, she had no  
 claim for expences; but the Court adhered.

MACMILLAN & GRANT, W. S.—L. & C. GORDON,—Agents.

No. 447.

W. WALKER and Others, Petitioners.—*Sandford*.

March 9, 1822.

FIRST DIVISION.  
 S.

*Bankrupt—Trustee*.—In 1785, the estates of Wil-  
 liam Gibb were sequestrated under the bankrupt-

act, and a trustee was appointed ; but he died without having been confirmed, and no farther steps were taken under the sequestration. Walker and others, creditors of Gibb, having applied for authority to call a meeting for the election of a new trustee, the Court remitted to the sheriff ' to inquire into the state of the ' bankrupt-estate and other circumstances connected ' with the petition ;' and, on his report, granted the prayer of the petition.

N. W. ROBERTSON,—Agent.

Mrs. BEGBIE, Pursuer.—*Fergusson—Napier.*  
The Reverend R. FELL, Defender—*J. Wood.*

No. 448.

*Proving of Tenor—Process.*—In a proving of the tenor by Mrs. Begbie of a bond alleged to have been granted by Mr. Fell, the casus amissionis was said to be ' the entrusting her papers to Dr. Hall, and ' this bond must have been lost or have fallen aside ' in his keeping.' It was objected, that this was not a sufficient specification of the casus amissionis, and that in the libel the bond was not narrated, but merely referred to. The Court held the casus amissionis condescended on not sufficiently specific ; that the terms of the bond ought to have been engrossed in the libel ; and after allowing a diligence for recovery of written evidence, which failed, they dismissed the action.

March 9, 1822.

FIRST DIVISION.  
S.

J. COOK—A. DOUGLAS, W. S.—Agents.

No. 449. A. SANDERSON, Suspender.—*Lumsden—Matheson.*  
F. FARQUHARSON, Charger.—*Hutcheson.*

March 9, 1822. *Bill of Exchange.*—The question here was, Whether the terms of an oath, emitted by Farquharson, instructed that he was not a bona fide holder of a bill on which he had given Sanderson a charge. The Lord Meadowbank. H. Lord Ordinary, on advising it, refused a bill of suspension; but the Court passed it.

W. DUTHIE, W. S.—A. STEELE, W. S.—Agents.

No. 450. T. HARKNESS and Others, Suspenders.—*Marshall.*  
W. A. and G. MAXWELL, Chargers.—*Matheson.*

March 9, 1822. *Summary Diligence.*—Harkness having been sequestrated under the bankrupt-act, he offered a composition at the meeting immediately after the second examination, which was afterwards accepted of. He and certain other persons granted a bond in common form, binding themselves ‘to make payment to each and all the just and lawful creditors of the said Thomas Harkness, at the date of awarding the sequestration, of the sum of six shillings sterling in the pound of the respective debts due to the said creditors at and prior to the date of the said sequestration.’ The bond contained a clause of registration for execution; and Maxwells, who had been ranked as creditors for claims which were chiefly on open accounts, gave the obligants a charge on the bond for the composition. They suspended, on the grounds,—1. That the charge was incompetent, as the claim was illiquid; and, 2. That the accounts,

which were overcharged, had not been scrutinized in the sequestration. The Lord Ordinary, 'in respect of the practice of the Court,' repelled the objection to the competency; and the Court refused a petition, without answers.

Their Lordships considered the procedure correct; but that, at all events, the objection was unavailing, as the charge might be turned into a libel.

A. MANNERS, W. S.—

—Agents.

W. How, Pursuer.—*Cranstoun—Cunninghame.*

No. 451.

D. BRYDEN and Others, Defenders.—*Moncreiff—Jardine.*

*Service—Title to Pursue.*—Marion Johnstone disposed, by a mortis causa deed, certain heritable property to Jean and Janet Gillies, and their heirs. These persons predeceased the disposer, who died without altering the deed. Bryden and others thereupon obtained themselves served heirs of line of Jean and Janet Gillies, as descended from their *aunt*, and also heirs of provision of Marion Johnstone. They were infeft and in possession.

March 9, 1822.

SECOND DIVISION.

Lord Cringletie.

M'K.

How also got himself served heir of line of Jean and Janet Gillies, as a descendant of their *uncle*, and was likewise served heir of provision of the disposer. He was infeft on a charter from the superior, and, as the nearer heir, raised an action of reduction of the service and titles of Bryden and others; of declarator, that he was the exclusive proprietor; and of removing. The proofs in the services having been produced, Bryden and others objected,

1. That there was not legal evidence of How's propinquity; and, 2. That even supposing he was a nearer heir, yet he was bound to prove that certain descendants of the uncle were dead, before he could prevail in the action, seeing they were in possession by a regular service and infestment. The Lord Ordinary decerned in terms of the libel; and Bryden and others having reclaimed, and thereafter raised a reduction of How's titles, on the ground that there was a nearer heir in existence than him, his Lordship reported it, in order to be advised with the previous action. The Court held, 1. That How's propinquity was proved. 2. That although the existence of a nearer heir were established, (which it was not), he was entitled to prevail against Bryden and others; and, 3. They found that they had no title to reduce How's service.

W. PATRICK, W. S.—D. MURRAY, W. S.—Agents.

No. 452. Mrs. S. M'KENZIE and Others, Suspenders.—*Cranston—Murray—Mackenzie.*

Rev. S. FRASER, Charger.—*Clerk—Skene.*

March 9, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Robertson.

M'K.

*Jurisdiction—Glebe.*—A glebe had been designed for the minister of Stornoway in 1755; and, in 1821, an application was made to the presbytery by a new minister, stating that the boundaries of the old glebe could not be discovered, and praying them to design another glebe. The presbytery having done so, and a petition having been presented to the judge ordinary for a warrant to put the minister into possession, a bill of suspension and interdict was offered by Mrs. M'Kenzie, alleging that the presbytery had encroach-

ed on her property ; and maintaining,—1. That the presbytery had no jurisdiction to design a new glebe, as it was possible to trace out the old one ; and, 2. That their proceedings were irregular and unjust. The Lord Ordinary refused the bill ; but the Court passed it.

YOUNG, AYTOUN, & RUTHERFORD, W. S.—R. MACKENZIE, W. S.  
Agents.

W. and J. WATSON, Pursuers.—*Greenshields*.  
J. AUCHINCLOSS, Defender.—*D. M'Farlane*.

No. 453.

*Prescription*.—This was an action on certain promissory-notes granted in 1810 by the late J. and A. Auchincloss against the defender, their father, as representing them by vitious intromission. The Lord Ordinary, in respect that the bills founded on are all dated in 1810, and that no diligence or action has been raised against the debtors in these bills nor their representatives, and in respect the defender is not one of these representatives, sustained a defence of prescription ; and the Court adhered.

March 9, 1822.

SECOND DIVISION.

Lord Cringlatie.

B.

J. R. SKINNER, W. S.—C. J. F. ORR, W. S.—Agents.

CUNNINGHAME and BRUNTON, Advocators.—*Baird*.  
T. BAILLIE, Respondent.—*Forsyth—Sandford*.

No. 454.

*Expences in Inferior Courts*.—After this case, (See No. 29), which was an advocacy from the bailie court of Edinburgh, had returned to the Lord Ordinary, he remitted it to the auditor to tax the advocators expences. In his report, the

March 9, 1822.

SECOND DIVISION.

Lord Pitmilley.

B.



auditor called his Lordship's attention to an objection which had been stated to the account of expenses incurred in the inferior court, that they were charged at a higher rate than those in the Supreme Court for similar business; and as it was one of general importance, he prayed his Lordship's judgment on it. The Lord Ordinary reported the objection to the Court; who, finding that the account had been paid, did not modify it in this instance, but qualified their interlocutor, so as this case might not be a precedent for these high charges in future.

N. W. ROBERTSON—T. BAILLIE—Agents.

No. 455. Mrs. S. M'KENZIE and HUSBAND, Petitioners.—*Clerk*  
—*Mackenzie.*

March 9, 1822.

SECOND DIVISION.

F.

*Protest.*—During the dependence of an appeal to the House of Lords, at the instance of Mrs. M'Kenzie and her husband, they applied to the Court to name a curator ad litem to their infant children, (whose rights were adverse to those of their parents), 'to attend to their interest during the discussion of the said cause.' But the Court considering the application incompetent, the petition was withdrawn.

ROGER AYTOUN, W. S.—Agent.

# THE CASES

DECIDED IN

THE COURT OF SESSION,

SUMMER 1822.

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MARQUIS of TWEEDDALE, Pursuer.—*Clerk—Mon-creiff—Murray.* No. 456.  
C. KERR, Defender.—*Cockburn.*

*Property—Alvei Mutatio—Alluvio.*—The estates of the Marquis of Tweeddale and of Mr. Kerr were originally separated by the river Kale; but, in consequence of a change in its course, a dispute arose as to the right to three acres of land which came thus to be situated between the river and Mr. Kerr's property. In an action of declarator brought by the Marquis against Mr. Kerr, issues were sent to a jury, who returned a verdict, finding,—1. That the Kale (which was admitted to have been the march) ran at one time in a particular line. 2. That within forty years it had shifted its course, whereby three acres, formerly on the side nearest the estate of the Mar-

May 14, 1822.  
FIRST DIVISION.  
Lord Gillies.  
H.

quis, were now on that of Mr. Kerr. 3. That since this change the Marquis had never enjoyed possession of them; and, 4. In answer to an issue, Whether this change had taken place 'by the imperceptible addition of soil to the bank of the river on Kerr's side?' they found, 'that the change in the river Kale has been gradual and imperceptible.' On this verdict, it was argued by the Marquis, that as the three acres had been situated within the years of prescription on his side of the river; as there was no evidence of possession by Kerr, and as a gradual change of boundaries only had been proved, he was entitled to decree. Kerr, on the other hand, contended, that as the river was the boundary, all the ground on his side belonged to him; and that the addition having been made imperceptibly, he had right to it alluvione. The Court, on the report of the Lord Ordinary, decided in favour of Kerr.

A majority of their Lordships were of opinion that this was not a case of alluvio, but of *alvei mutatio*;—that as the river was the boundary, so any change in its course must be held to be consented to by the parties, as they were entitled to restrain it by embankments.

*Purser's Authorities.*—2. Stair, i, 29–35; 2. Ersk. i, 14.

*Defender's Authorities.*—2. Stair, i, 35; 2. Bankt. i, 10; 2. Ersk. i, 14.

GIBSON, CHRISTIE, & WARDLAW, W. S.—BRODIE & INLACH,  
W. S.—Agents.

J. HENRY, Advocate.—*Blackwell.*

No. 457.

ROBERTSON and SIME and Others, Respondents.—  
*Cranstoun—Maitland.*

May 14, 1822.

FIRST DIVISION.  
Lord Alloway.  
S.

*Competition between Assignee and Poinder.*—Sir John Leslie, on the 1st of January 1816, assigned to Henry, in security of a debt, his whole moveables in and about Findrassie, conform to inventory, with a power of sale. An instrument of delivery was executed; but Sir John retained the effects till the 15th of June 1818, when he fled to the sanctuary, and they were taken possession of by Henry. On the 29th of the same month, a poinding was executed of these effects by M'Kimmie, a creditor, on letters of horning, dated on the 18th. In a competition between M'Kimmie, Robertson, and Sime, and others, who claimed as creditors, they alleged that Henry's right was simulate and collusive; and the Sheriff preferred them. But the Lord Ordinary, in an advocacy, seeing no evidence of this, altered this judgment, and preferred Henry, in respect that 'it is instructed that the poinding was not executed until the 29th of June 1818, and the horning upon which it proceeded is not dated until the 18th June; whereas the complainer obtained delivery of the whole effects, conform to inventory; and removed them from the possession of Sir John into his own possession upon the 15th of that month; and that, therefore, the advocate's conveyance, followed by possession, previous to any poinding at the instance of the creditors, must be preferable.' To this interlocutor the Court adhered.

*Respondents Authorities.*—1. Bell, 173; Chalmers, July 19, 1799, (11590)

Henderson, Jan. 15 1697, (1057); Bank of Scotland, Dec. 23, 1708, (1057); Hamilton, Feb. 23, 1709, (1039).

A. ROBERTSON, W. S.—Æ. M'BEAN, W. S.—Agents.

No. 458. MAGISTRATES OF FORFAR, Pursuers.—*Greenshields—Moncreiff.*

J. ADAM, Defender.—*Cranstoun—J. W. Dickson—Currie.*

May 14, 1822.

SECOND DIVISION.

Lord Pitmilley.

F.



*Public Officer—Town-Clerk.*—In 1803, the Magistrates of Forfar granted a commission to James Walker and James Adam, and the survivor of them, for life, of the office of town-clerk. Walker having died in 1815, the Magistrates raised an action of declarator, to have it found, 1. That in respect of incapacity to perform the duties, the commission in favour of Adam was null ab initio; or, 2. That, at least, he had no power to appoint a deputy, except by their consent. The Lord Ordinary, after allowing a condescendence, found, that, ‘in respect of the terms of the commission, the pursuers have no right to remove the defender without his consent, on the grounds stated in the libel and condescendence, from the office which their predecessors conferred on him during his life; and that he is entitled to appoint a deputy, for whom he must be answerable, and whom the pursuers, who do not insist that the defender shall perform the duties of the office personally, must receive, provided such deputy is fit and qualified to discharge the duties of the appointment;’ and assoilzied the defender. But the Court recalled this interlocutor; allowed a proof of the condescendence before answer; and on its be-

ing reported, (in consequence of a recommendation from the Bench), the two senior counsel, by authority of the parties, framed a minute of agreement, by which it was arranged, *inter alia*, 1. That Adam should be continued in his office. 2. That the Magistrates should have power to name, and remove at pleasure, a deputy; and, 3. That Adam should draw three-fourths, and the deputy the other fourth of the emoluments. The Court decerned in terms of this minute, and refused a petition by Adam, who alleged that the findings in the minute were ultra fines compromissi.

*Pursuers' Authorities.*—1. Stair, xii, 7; 1. Ersk. ii, 13; 2. Ersk. xii, 7; Hog, Dec. 1681, (13186); Wedderburn, Nov. 1683, (13113); Comyn's Dig. voce Officer.

*Defender's Authorities.*—Taylor, July 17, 1767, (13138); Abercromby, Nov. 19, 1802, (13154).

A. DUNCAN—M. PATTISON—C. GORDON,—Agents.

Mrs. E. INNES, Petitioner.—*Rutherford*.

No. 459.

*Process*—48. Geo. III. c. 151, § 16.—The petitioner having allowed an interlocutor to become final against her by mistake, the Court remitted to the Lord Ordinary to receive a representation, on payment of the previous expences, in terms of the 48: Geo. III, c. 151, § 16.

May 14, 1822.  
SECOND DIVISION.  
Lord Cringletie.  
F.

J. W. M'KENZIE, W. S.—J. KERR, W. S.—Agents.

No. 460.

T. STEVENSON, Petitioner.—*Whigham*.A. M'LAREN and Others, Respondents.—*Keay*.

May 14, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Cringletie.

B.

*Bankrupt—Sequestration.*—Stevenson, designing himself cattle-dealer and grazier, presented a petition to the Lord Ordinary on the Bills, praying for sequestration of his estates under the bankrupt-act. His Lordship refused it, 'in respect it does not appear that the petitioner dealt in cattle not grazed on his farm; but, on the contrary, that the cattle specified to have been bought by the petitioner were no more than was sufficient to stock the grazings taken in lease by the petitioner.' To this judgment the Court adhered; and a petition was afterwards withdrawn.

*Petitioner's Authority.*—2. Bell, 356-7.

A. CRAUFUIRD, W. S.—M'MILLAN & GRANT, W. S.—Agents.

No. 461.

J. LAWRENSON, Pursuer.—*Moncreiff—Alison*.BURNS' TRUSTEES, Defenders.—*Jeffrey—Blackwell*.

May 14, 1822.

SECOND DIVISION.

Lord Glenlee.

F.

In this case there was no general point. The question was, Whether Burns had erected, in terms of a building-contract, certain additions to Invereighy house in a workmanlike manner, and what was the amount of his claims against Colonel Lawrenson? The Lord Ordinary, after ordering the opinion of tradesmen, reported the case to the Court, by whom a judgment of a special nature was pronounced.

J. YOUNG, W. S.—FORSYTH & M'DOUGAL,—Agents.

W. MAXWELL and Others, Suspenders.—*Clerk*— No. 462.  
*Moncreiff.*

R. BROWN, Charger,—*Jeffrey—More—Jameson.*

*Insurance—Risk.*—In 1810, while the continental system was in force, Brown shipped on board the Maria Francisca, a foreign vessel, lying at Leith, manned by foreigners, a cargo of refined sugar for Gottenburgh. The Swedish government had, in March of that year, prohibited the importation into Sweden of British colonial produce, and declared that all vessels containing it should be ordered off. To evade this prohibition, (according to a common practice), Brown obtained simulated papers, so as to make the cargo appear to be American, with a license of protection from the British government. On the 7th November 1810, Maxwell and others insured the cargo ‘at and from Leith to Gottenburgh, with liberty to seek and join convoy, and to carry simulated papers and British license, and to sail under any flag; beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship at Leith, &c. until said ship, &c. shall be arrived at Gottenburgh, &c. until she shall be moored at anchor twenty-four hours in good safety;’ and, with regard to the cargo, ‘until the same be there discharged and safely landed;’ and ‘in case of loss, capture, seizure, or detention by any power whatever, or any cause whatever, to pay a loss within two months after receipt of advice by the assured,’ &c.

May 14, 1822.

SECOND DIVISION.

Lord Pitmilley.

M<sup>c</sup>K.

The vessel sailed with convoy on 15th November, but was, on the night of the 5th December, captured by mistake by the Bold, a British cruizer,



and brought back to Leith. On the 31st December she was restored to the owners, but was unable to sail for want of convoy. In the meanwhile, Sweden, on the 12th of November 1810, had proclaimed war against Britain, and strictly forbade the importation of colonial produce in any ship whatever. This declaration was known in this country in December; but, notwithstanding, the British government continued to grant licenses as formerly. On the 15th April 1811, the vessel again sailed under a new license, and with convoy, for Gottenburgh, but was captured by a Danish vessel on the 23d of that month, and condemned as a prize.

Brown having raised an action before the Court of Admiralty against the insurers, on the policy of insurance, for the value of the cargo, they pleaded that the policy was vacated, as the second voyage was different from that on which the insurance was effected, and was attended with an increased risk: that it was no longer a voyage to a neutral but to a hostile country: that it was now impossible to enter the harbour of Gottenburgh even with simulate papers: that it was not a lawful voyage, as the trade was with an enemy, which no British license could legalize, to the effect of rendering them liable under the policy; and that the voyage was as much altered by the change in the political relations of the two nations, as if there had been a deviation from the direct and ordinary course. The Judge-Admiral, on the ground that no substantial change was made on the existing relations between the two countries by the declaration of war; that the premium of insurance rather fell than rose; and that the cargo was to be covered as American; decerned a-

gainst the insurers. In a suspension, the Lord Ordinary found, 'that the declaration of war between this country and Sweden during the time when the ship lay at Leith, after she had been brought back by the Bold gun-brig, and the fact of the owner of the goods insured and the master of the ship being in the knowledge of war having been declared between the two states, formed no legal bar to the Maria Francisca proceeding on her voyage, seeing that on this occasion she sailed with a British license and with convoy, bound for the port of Gottenburgh;' and 'that the second sailing must be held to be a continuation of the voyage insured by the policy, and which was begun on the 15th of November 1810.' But the Court, holding that the second sailing was a different voyage from the first, and that the risk was changed by the declaration of war, altered this interlocutor, suspended the letters simpliciter; and thereafter adhered, 'in respect the petitioner (Brown) does not distinctly offer to prove any consent on the part of the underwriters before the vessel sailed from Leith on the 15th April 1811, to hold the voyage covered by the policy.'

It was observed, that although the license from government might protect against the pains of law for trading with an enemy, yet it could not affect the interests of the insurers.

*Suspender's Authorities.*—1. Park, 266; Marshall, 184, 326.

*Charger's Authorities.*—Marshall, 559; 1. Park, 231; 2. Park, 411, 413, Note 2, 464; 12. East, 394; 1. Maule & Sel. 46; 2. Doug. 251.

GIBSON, CHRISTIE, & WARDLAW, W. S.—C. J. F. ORR, W. S.—  
Agents.

No. 463.

R. MUIR, Pursuer.—*M'Farlane*.A. WILSON, Defender.—*Jeffrey—Walker*.

May 15, 1822.

FIRST DIVISION.

Lord Alloway.

D.

*Landlord and Tenant—Clause*.—Muir let a tavern to Wilson, with permission ‘to take down a partition, ‘for throwing two rooms into one, for a tap-room.’ And it was also agreed, that ‘provided the insurers ‘will allow it at the same rate as at present, or by ‘paying the difference of insurance, he may put a ‘stove in one of the apartments, and conduct the ‘smoke by an iron pipe into the tap-room vent.’ Instead of throwing the two rooms into one, Wilson cut off a part from the one by a new partition, united it with the other, and in the partition placed a stove, the pipe of which he led along the inside of the roof. This pipe having twice set fire to the house, Muir brought a declarator and suspension and interdict, to have it found that Wilson had no right to divide the rooms in the mode which he had done, —nor to erect the partition,—nor to place a stove in it; and that he was only entitled to put a stove in an apartment distinct from the tap-room. Wilson resisted these conclusions, on the grounds,—1. That his operations were sanctioned by the lease; and, 2. That they had been acquiesced in for three years. The Lord Ordinary repelled the defences, decerned in terms of the declarator, and granted the interdict. The Court refused a petition, without answers.

D. CLEGHORN, W. S.—TOD &amp; WRIGHT, W. S.—Agents.

JOHN SAMSON and Others, Suspenders.—*Cranstoun—* No. 464,  
*Shaw.*

J. M'CUBBIN, Charger.—*Jameson.*

54. *Geo. III, c. 137, § 4—Poinding—Mora.*—Mac- May 15, 1822.  
 Cubbin, a creditor of Samson, executed a poinding of FIRST DIVISION.  
 his effects on the 11th October 1821; but adopted no Bill-Chamber.  
 farther steps till the 17th of December, when he re- Lord Meadowbank,  
 ported the execution, and obtained a warrant of sale. S.  
 In the meanwhile, Samson had been rendered bankrupt on the 10th December, and a sequestration of his estates was awarded on the 21st of the same month. Intimation having been given by M'Cubbin that he proposed to carry the sale into effect on the 27th; and there being neither an interim-factor nor trustee elected, Samson, along with the concurring creditor in the sequestration, presented a bill of suspension and interdict, on the grounds,—1. That the diligence was inept, as an interval of two months and seven days had elapsed between the poinding by the messenger and the report of his execution. 2. That as the sale had not taken place at the date of the sequestration, the diligence was only inchoate, and the effects were carried by the sequestration; and, 3. That even although it was to be held as complete at the date of the warrant of sale, it was ineffectual, as being within sixty days of the first deliverance in the sequestration. The Court, on the report of the Lord Ordinary, and on advising memorials, passed the bill, and granted the interdict, without caution or consignment.\*

Their Lordships expressed an unanimous opinion that

\* This case was afterwards settled extrajudicially.

the poiding was inept by the delay in reporting the execution ; and that the property of poided goods is not transferred till after the sale has been completed in terms of the statute.

*Suspenders Authorities.*—(1.)—54. Geo. III, c. 137, § 4; A. S. Aug. 10, 1754.—(2.)—2. Ersk. xi, 7; Tullis, June 18, 1817, (F. C.); A. S. Dec. 14, 1805; 4. Stair, xxxvii, 33, 3; Parkers, Feb. 5, 1783, (2868)—(3.)—54. Geo. III, c. 137, § 40.

*Charger's Authorities.*—(2.)—1. Ross, 437; 2. Bell, 69.—(3.)—Blaikie, Jan. 21, 1809, (F. C.)

C. FISHER—W. BALLANTINE, W. S.—Agents.

No. 465. A. DOUGLAS and his Tutors, Pursuers.—*Fullerton—Dunlop.*

Mrs. DOUGLAS and Others, Defenders.—*Walker.*

May 15, 1822.

FIRST DIVISION.

Lord Gillies.

H.

*Clause—Tailzie.*—By the entail of Mains, comprehending ‘ coal, coal-heughs, limestone, mills, woods, ‘ fishings,’ &c., it is made lawful to the heirs of entail ‘ to grant liferent infestments to their ladies and ‘ to their husbands, in lieu of the courtesie, from ‘ which they are hereby excluded, not exceeding one- ‘ half of the said lands and others foresaid, so far as ‘ the samine is free and unaffected for the time with ‘ former liferent or real debts, and after deduction of ‘ the yearly annual rents of the personal debts, if any ‘ be, that may affect the samine, as said is;’ and power is granted ‘ to provide their younger children, besides the heir, to three years free rent of the ‘ said estate,’ under the same qualification as in the preceding clause. Colin Douglas, an heir of entail, in virtue of these clauses, gave a bond of annuity to his wife for £500, and a bond of provision to his younger children for £6,000. At his death, the total

rental of the estate, including that of Lurg and Corseburn, (which had been subsequently entailed under the same conditions and to the same heirs,) was £1,848 11s. ; but two widows of former heirs held liferent rights to the extent of £600, leaving a balance of £1,248 : 11s. An action of declarator was, on the succession of the pursuer, A. Douglas, brought by his tutors, to have it found, that the annuity and provisions exceeded the powers of the granter, and that from the above balance must be deducted,—1. The rent of a coal and lime-work, which was properly price, and was not regularly productive. 2. The rent of Lurg and Corseburn, as the entail of these lands was liable to reduction ; and, 3. That in estimating the provisions to the children, the liferent of Mrs. Douglas must be subtracted. The Lord Ordinary having reported the case, the Court refused to sustain any of these claims of deduction, and assolvied the widow ; but limited the provision of the children to £3,745 : 18s., being three years free rent as at the death of their father.

G. DUNLOP, W. S.—WALKER, RICHARDSON, & MELVILLE, W. S.  
—Agents.

A. CAMPBELL, Pursuer.—*Fullerton*.

No. 466.

A. DOUGLAS, Defender.—*Walker*.

10. *Geo. III, c. 51—Tailzie*.—This was a declarator by an heir of entail in possession, to constitute three-fourths of the expences of improvements made on the entailed estate of Blythwood, under 10. *Geo. III, c. 51*, against the next heir of entail. In defence, various objections were made ; and, in parti-

May 15, 1822.

FIRST DIVISION.

Lord Gillies.

H.

cular, 1. That an account was not subscribed prior to registration, and that neither it nor the vouchers were recorded till seven days after the statutory period : 2. That the account and relative vouchers of the price of a quantity of wood had not been signed and recorded till after the lapse of the limited time, computing from the date of the purchase ; and, 3, That an intimation was not sufficiently specific, by which the pursuer had given notice that he intended, ' for the improvement of the said lands and estate of Blythswood and others, lying in the county of Renfrew, to inclose, plant, and drain the said lands, and to build and repair a mansion-house and offices upon the said estate, lying in the county of Renfrew, or to add thereto, and make other improvements thereon, under the authority of the said act.' The Court, on the report of the Lord Ordinary, sustained the first objection ; but repelled the second, as the writs had been signed and recorded within the requisite time from the date of applying the wood to the use of the estate ; and also repelled the third objection.

G. DUNLOP, W. S.—WALKER, RICHARDSON, & MELVILLE, W. S.  
—Agents.

No. 467.

J. TELFORD, Petitioner.—*M'Farlan*.

JAMES, WOOD, and JAMES, Respondents.—*A. Murray*.

May 15. 1822.

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H.

*Execution pending Appeal*.—Decree for interim execution pending appeal, on caution, in terms of the decision of the Court, in No 329.

R. JAMIESON, W. S.—BROWN & LAWSON, W. S.—Agents.

W. DAVIDSON, Pursuer.—*Moncreiff—More.*  
DUKE of HAMILTON and W. WALKER, Defenders.—  
*Clerk—A. Wood.*

No. 468:

May 15, 1822.

*Servitude—Reserved Power*—The Duke of Hamilton, as proprietor of the barony of Polmont, feued it out in small portions, and, among others, ‘five oxengates and half an oxengate of land of the town and lands of Over Polmont’, to George Shaw, ‘reserving always to the said Duke, his heirs and successors, the privilege and liberty of winning coals and digging shanks, and making ways and passages within any part of the said five oxengates and one-half of an oxengate of land, for payment to the said George Shaw and his foresaids of six firlots of oatmeal for each acre they shall happen to want yearly, and shall be rendered unprofitable to them.’ A similar clause was introduced into the title-deeds of all the other feus.

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Lord Pitmilley.  
F.

Davidson having acquired George Shaw's feu, raised an action of declarator, and a suspension and interdict against the Duke, and his tenant, Walker, to have it found that they had no right to sink pits, &c. within his feu, in order to work coal in the adjacent lands. The defence was, that the Duke was proprietor of the whole field of coal within the barony: that he had reserved a power of working it, and sinking pits within all the feus; and that the clause did not limit him from working coal beyond the boundaries of the feu. The Lord Ordinary assoilzied the defenders; and the Court adhered.

*Pursuer's Authority*—Smith, June 21; 1768, (15266):

W. DYMCK, W. S.—R. RUTHERFORD, W. S.—Agents:



**No. 469. MONKLAND CANAL COMPANY, Suspenders.—*Jardine.*  
W. DIXON, Charger.—*Forsyth.***

**May 16, 1822.** This was a question as to passing a bill of suspension, and granting an interdict in the meanwhile, against Dixon making use of certain roads adjacent to the Monkland Canal. The Lord Ordinary passed the bill, and granted the interdict as to two of the roads, and refused it as to another. But the Court extended it to them all; and ordained the Canal Company to keep an account, while the suspension depended, of the Canal dues paid by Dixon.

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**Bill-Chamber.**  
**Lord Meadowbank.**  
**H.**

**W. PATRICK, W. S.—D. FISHER,—Agents.**

**No. 470. W. ORR, (Factor loco Tutoris for the Children of the late W. Orr), Pursuer.—*Clerk—Jameson.*  
J. ROSS and Others, Defenders.—*Jeffrey—More—Graham.***

**May 16, 1822.** *Minor's Liability for Acts of Factor loco Tutoris.*—A legacy having been left by a person in England to the defenders, while minors, J. Smith was appointed their factor loco tutoris. Considerable difficulty having arisen as to getting payment, Smith sent the late W. Orr to London, in order to arrange matters. He was detained there for a considerable time, and expended money in consulting counsel and adopting different measures. At a distance of time, and after his death, the pursuer raised an action, both against Smith, as factor loco tutoris, and against his consti-

**FIRST DIVISION.**  
**Lord Alloway.**  
**H.**

tients, for payment of the expences and for a remuneration. This was resisted by the defenders, on the ground, that the employment of Orr was unnecessary, and not for their benefit; and that, at all events, they were not jointly liable in payment. The Lord Ordinary at first decerned against them, in respect that Orr was ' expressly employed by Smith in his ' character of factor loco tutoris,' ' reserving to the ' defenders their relief against Smith and against ' his cautioners, if the employment of Orr was unnecessary, and not beneficial to the estate.' But, on a representation, his Lordship reported the case, and the Court decerned against them all, conjunctly and severally.

R. CARGILL, W. S.—W. & A. G. ELLIS, W. S.—Agents.

W. STEWART, Suspender.—*Hope*.

J. BROWN, Charger.—*Fullerton*.

No. 471.

*Process—Advocation—A. S. Feb. 7, 1810.*—Stewart having been charged for payment of the expences of an advocation, under a decree in absence, brought a suspension on two points of form.—1. That the letters of advocation (which were at the instance of the original pursuer in the inferior court) had not been executed against him; and, 2. That the decree in absence had not been inrolled, in terms of the Act of Sederunt 7th February 1810, in the roll of decreets in absence. The Lord Ordinary repelled the reasons of suspension; and the Court adhered:

May 16, 1822.

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Lord Alloway.  
S.

It was observed on the Bench, that the provisions of the Act of Sederunt were intended as a privilege to

parties, and not to prevent them from resorting to the old form.

*Suspender's Authorities.*—4. Ersk. iii, 6; 4. Ersk. ii, 41.

*Charger's Authority.*—1. Ivory, 254.

J. & A. SMITH, W. S.—R. HOTCHKIS, W. S.—Agents.

No. 472. Lady M. L. CRAWFURD, Suspender.—*Jeffrey—Ivory.*  
D. MARTIN and T. HORSBURGH, Chargers.—*Clerk—*  
*Jardine.*

May 16, 1822. *Road Statute.*—By the Fifeshire road statute, (30. Geo. III. c. 93), the trustees are empowered to erect toll-houses on or near any of the public roads; ‘and, for that purpose, the said trustees shall be, and they are hereby authorized and empowered to purchase of the proprietor such pieces of ground as they shall judge most convenient, not exceeding one-sixth part of an acre for each toll-house; and in case the trustees cannot agree with the proprietor or occupier for the price of the said ground, they shall apply to the quarter-sessions of the county, who are hereby empowered to oblige the said proprietor or occupier to sell, dispone, and convey the said piece of ground to the said trustees, at such a price as the said quarter-sessions shall judge to be adequate thereto.’ A cross-road having been made from one public road to another, at the expence of Lady M. L. Crawford, and other private individuals, the trustees, in order to prevent it being used as the means of avoiding payment of toll, proceeded to erect at one end of it, and adjacent to one of the public roads, a toll-house on the property of Lady M. L. Crawford. Of this she complained by suspension and

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Lord Pitmilley.

M.K.

interdict, on the ground chiefly that the trustees were not entitled to erect the toll-house until they had purchased the property from her in the mode prescribed by the statute. The Lord Ordinary repelled the reasons of suspension; but the Court, holding that the trustees were not entitled to build the toll-house without having in the first place settled for the value of the ground, altered the interlocutor, suspended the letters, and granted the interdict.

*Suspender's Authorities.*—Goldie, June 1, 1814, 2. Dow, 525; Shand, July 28, 1814, 2. Dow, 520; Burnet, July 5, 1815, 3. Dow, 281.

G. LYON, W. S.—J. HERIOT, W. S.—Agents.

Mrs. HUGHSON, Pursuer.—*L' Amy.*

No. 473.

J. HUGHSON, Defender.—*M'Farlane.*

*Heir and Executor—Parent and Child.*—The late L. Hughson having died possessed of heritable and moveable property, the defender succeeded to the former as his heir, and the pursuer, in right of the executor, to the latter. Prior to his father's death, the defender, who was then major, became insolvent, and, on his account, the father contracted several debts, which were exigible out of the executry. An action was brought by the pursuer, inter alia, for relief of these debts against the defender, who pleaded in defence,—1. That the debts were for grocery goods, furniture, and rent, which, on the order of his father, had been given to him; and that as a parent is bound to maintain his child, who at any period of life is unable to support himself, so the pursuer could not demand payment of these articles; and, 2. That, at all events, as his father took no voucher of debt from

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him, donation was to be presumed. The Lord Ordinary found, ' that the pursuer is in right of the executor of the late L. Hughson, and that the defender is in right of the heir; and that each of them, in their respective rights, has succeeded to valuable properties: that the heir must be accountable to the pursuer, as executor, for all those sums or debts which his father, during his life, could have claimed from him in any accounting or settlement with him; therefore, with regard to the first article of the condescendence, being £180, as the amount of goods furnished by W. Angus to the defender, for which his father was guarantee, and the amount of which Angus retains out of an account due to the pursuer, as executor, finds that it is a debt of which the pursuer, as executor, is entitled to be relieved: finds the pursuer also entitled to the amount of the second and third articles, being the claim which Mr. Ogilvy has against the executry, on account of the assignment of a debt by the defender, and on account of household-furniture assigned by the creditors to him, and which, although done by his father's desire, were set up as distinct claims against the defender in Mr. Ogilvy's person; and finds the pursuer entitled to claim from the defender the amount of the rent due by him to Mr. Bruce, and which Mr. Bruce retains from the executry.' The Court refused a petition, without answers.

*Defender's Authorities.*—4. Stair, xlv, 17, 18thly; 1. Stair, viii, 2; 3. Ersk. iii, 92; 2. Ersk. ix, 62.

S. C. SOMERVILLE, W. S.—P. PHILP,—Agents.

**J. WILSON and his TRUSTEE, Pursuers.**—*Cranstoun—Greenshields—J. Wilson, junior.*

No. 474.

**MAGISTRATES OF DUNFERMLINE.**—*Moncreiff—Blackwell—H. J. Robertson,*

and

**T. SCOTLAND, Defenders.**—*Clerk—Jameson.*

*Bankrupt—Trustee's Claim against Creditors.*—

May 17, 1822.

Wilson was ranked on the sequestrated estate of R. Hutton, on behalf of J. Wilson and Son, of which he was a partner, and as mandatory for two other creditors. Afterwards he was appointed trustee; and, by the instructions of the creditors, a coal-pit belonging to the town of Dunfermline, of which Hutton was tenant, having been continued to be worked, advances of money were made by Wilson, as trustee. Having resigned his office, and become bankrupt, he, with his trustee, raised an action against the Magistrates of Dunfermline, and against Scotland, who had ranked as creditors on Hutton's estate, for repayment of his advances, jointly and severally. In defence, it was pleaded,—1. For them both, that the creditors, by continuing to work and sell the coal, formed themselves into a company; and that as Wilson was a creditor, he, as a partner in the joint trade, was only entitled to sue each of his copartners for that copartner's share of the common debt. 2. For the Magistrates, that they had lent money to the joint concern, and had claims for arrears of rent, which they were entitled to set off against Wilson's demand; and a similar plea was urged for Scotland, who, as law-agent, held an account against the estate. The Lord Ordinary decerned against the defenders, conjunctly and severally, in terms

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of the libel; and to this interlocutor the Court adhered, with this qualification, that Wilson's claim was to be 'liable to deduction of the proportion of loss effecting to the sum for which the pursuer ranked up on the estate of Robert Hutton and others.'

*Defenders Authority.*—McGhie, Nov. 18, 1785, (14668.)

GIBSON, CHRISTIE, & WARDLAW, W. S.—D. WILSON, W. S.—  
A. PEARSON, W. S.—Agents.

No 475. J. GOWAN, Pursuer.—*Moncreiff*—*Rutherford*.  
Dr. J. W. PURSELL, Defender.—*Cranstoun*—*Hope*.  
Mrs. GOWAN and her Curator ad Litem, Compearers.  
—*More*.

May 17, 1822. *Title to Pursue*—*Jus Mariti*, exclusion of.—George  
FIRST DIVISION. Warroch conveyed, in 1779, to James Warroch,  
Lord Alloway. whom failing, to Dr. Pursell, all his property; for  
D. the purpose, inter alia, of paying an annuity of £20  
to Catherine Pursell; 'but debarring hereby and ex-  
'cluding the jus mariti, &c. of any husband the said  
'Catherine P. Pursell may marry from any con-  
'cern with the annuities hereby provided; and de-  
'claring, that their own receipts therefor shall be  
'sufficient, without that of their husbands.' In  
1805, James Warroch, also now deceased, executed  
a trust-deed likewise in favour of Dr. Pursell, on  
the condition, inter alia, that he should pay the in-  
terest of £2,000 to Catherine Pursell, (and after a  
clause in the same terms as the above), 'declaring,  
'that the same shall not be attachable for the debts  
'of her husband, or otherwise than for her own par-  
'ticular debts,—debts contracted for her support  
'and clothing, the same being destined by me to se-

‘ cure to her the necessaries of life, under proper management on her part ; and, for that purpose, it is hereby declared, that no other receipt than one by herself singly shall be a sufficient acquittance for the interest of the money hereby assigned to her for her necessary subsistence during her life ; and, at her death, the principal sum shall devolve upon her children, in wedlock, share and share alike ; whom failing, it shall fall to and belong to the said Dr. J. W. Pursell.’ Catherine Pursell was married in 1806 to the pursuer, J. Gowan, and assigned to him and to herself, ‘ in conjunct-fee and liferent, and to the children of the marriage, in fee, all and sundry lands and heritages, debts, and sums of money, to which she presently has right, or may be in any manner of way entitled.’ After this marriage, J. Warroch, considering that Catherine had no issue, and that, according to his destination, the money would go to his heirs-at-law, declared, in a codicil, that ‘ I reverse that clause, and hereby commit to her discretion alone, as she may hereafter see cause, the sole and ultimate disposal of £2,000 sterling, as by the foresaid provided.’ Gowan having become embarrassed, assigned his estate, and all right, jure mariti, or otherwise, to cautioners, for payment of his debts ; and he, for their behoof, raised an action on the trust-deeds, concluding for payment of the bygone annuities, interest of the £2,000, and, in general, for count and reckoning. In defence, Dr. Pursell pleaded, that Gowan’s jus mariti was excluded, and that he had no title to pursue. The Lord Ordinary having ordered him to condescend on his intromissions, the Court at first adhered ; but, on a reclaiming petition, and Mrs. Gowan having com-



peared as a defender, they recalled their interlocutor, and (in absence) found, 'that the pursuer has no title to carry on the present action;' and thereafter, on a petition and answers, adhered.

*Pursuer's Authorities.*—Dick, Jan. 27, 1709, (5999); Sir J. Dalrymple, Feb. 5, 1745, (583); Gourlay, &c. v. Wedderspoon, &c. June 13, 1817, (Not rep.); Harvey, Feb. 21, 1791, (5980).

*Defender's Authorities.*—Stewart, Dec. 17, 1687, (5793); Cockburn, Feb. 21, 1679, (5793); Hill, Jan. 1719, (5797).

PEARSON & SANDILANDS, W. S.—J. & A. SMITH, W. S.—Agents.

No. 476.

G. ROBERTSON, Pursuer.—*Cunninghame*.

R. DONALDSON and Others, Defenders.—*J. Henderson, junior*.

May 17, 1822.

SECOND DIVISION.

Lord Kinnedder.

F.

*Expences.*—This was a question of expences. Robertson had brought an action of reduction of a trust-deed, granted in favour of the defenders, on the common law, and on the act 1696, c. 5, and obtained decree from the Lord Ordinary on the latter ground, with expences. The defenders alleged that they were not liable in expences, as they had agreed, after the case had been called, but before any opposition had been made, to allow decree to pass against them. They afterwards, however, appeared, and opposed decree, on the common law, from which ground Robertson passed. The Court refused a petition, without answers.

GREIG & PEDDIE, W. S.—GORDON & WILSON, W. S.—Agents,

J. HAMILTON, W. S., Suspender.—*Baird—Cuning-* No. 477,  
*hame.*

W. LAING, Charger.—*Rutherford.*

*Mandatory's responsibility for Expences.*—A bill of May 18, 1822.  
suspension, at the instance of the Earl of Strathmore, SECOND DIVISION.  
(who was abroad), having been refused, in respect of Bill-Chamber.  
no mandate, a second bill was presented in name Lord Meadowbank,  
of the Earl, and of Hamilton, as his mandatory, B.  
who produced a mandate. This bill was refused  
by the Court, as no caution was offered, (see No. 169),  
with expences : And warrant to extract the decree  
having been issued by the Lord Ordinary against  
Hamilton, he reclaimed, on the grounds,—1. That  
the Earl of Strathmore was to be regarded as a de-  
fender from whom no mandate was required ; and,  
2. That the mandatory of a defender is not personally  
liable for expences. But the Court adhered, holding,  
that as the bill was presented in name of Hamilton,  
he was dominus litis, and, as such, responsible.

*Suspender's Authority.*—Leigh, Dec. 19, 1792, (4645).

*Charger's Authority.*—M'Innes, June 3, 1813, (F. C.)

J. HAMILTON, W. S.—A. STEELE, W. S.—Agents.

J. BAILLIE and Others, Suspenders.—*J. Wilson, jun.* No. 478,  
A. RAMSAY, Charger.—*Baird.*

Baillie and others presented a bill of suspension of May 21, 1822.  
a charge at the instance of an indorsee of a bill on FIRST DIVISION,  
which they were obligants, alleging that the terms of Bill-Chamber.  
the charge did not sufficiently apply to it. But the Lord Kinnedder.  
D.

Lord Ordinary and the Court refused the bill, being satisfied that the allegation was groundless.

J. PATISON, jun. W. S.—A. HAY, W. S.—Agents.

No. 479. T. HIBBERT, Advocate.—*Cranstoun—Tavse—Brownlee.*

J. C. BRUCE, Respondent.—*Moncreiff—H. Drummond.*

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H.

*Sale—Implied Warrandice.*—Bruce raised an action against Hibbert, Clark, and Aitken, horse-dealers, for repetition of £25, being the price of an unsound mare. Hibbert's defence was, that he had bought it for £17:10s. from Aitken, with warrandice, and that afterwards he had sold it to Clark, without warrandice, from whom Bruce purchased it; and that, therefore, Bruce had no claim against him. The sheriff having decerned against him, he presented a bill of advocacy, which the Lord Ordinary refused, in respect he was satisfied the defenders 'had entered into a conspiracy or plot to sell the mare in question to Mr. Bruce as a sound one.' The bill was afterwards passed, and the Lord Ordinary assoilized Hibbert; but the Court being of the same opinion with the Lord Ordinary on the Bills, repelled the reasons of advocacy, and decerned against him, in terms of the libel.

J. JONES—J. FORMAN, W. S.—Agents.

J. KIRKHAM, (TOSHACK and IRELAND'S Trustee).—

No. 480.

*D. M'Farlane.*

H. CAMPBELL, Charger.—*Moncreiff—Blackwell.*

*Sasine.*—Toshack and Ireland obtained a disposition to certain heritable subjects, with a precept of sasine, ordering infeftment to be given 'by delivering to the said Adam Toshack and William Ireland, 'or their foresaid, or to their certain attorney or attorneys, bearers hereof, of earth and stone,' &c. In the instrument of sasine, the notary stated, that, 'compeared personally Robert Glass, mason in Edinburgh, as procurator and attorney for Adam Toshack,' &c., 'the said Robert Glass having and holding in his hands a disposition, of date, &c.' and 'containing the precept of sasine therein and after insert ;' and then he certified, that he 'gave and delivered to the said Robert Glass heritable state and sasine, &c., and that by delivering to the said Robert Glass, as procurator foresaid, of earth and stone,' &c. This instrument was written on three pages of a single sheet of parchment. Toshack and Ireland disposed the subjects in security, with a power of sale, to Miss Campbell, who was infeft. Having afterwards become bankrupt, their estates were sequestrated. Miss Campbell then proceeded to exercise her power of sale, when she was interrupted by a suspension and interdict at the instance of the trustee on the bankrupt estate, who alleged that her title was inept, 1. Because the notary had given sasine not to Toshack and Ireland, nor to their procurator, but simply to Robert Glass ; and, 2. Because he had not mentioned the number of pages of the instrument of sasine in

May 21, 1822.

FIRST DIVISION.

Lord Gillicie.

H.

the doquet. The Lord Ordinary at first suspended the letters. Afterwards, on a representation, he found them orderly proceeded, but refused expences. The Court, however, on a petition by Miss Campbell, decerned in her favour for the expences.

*Suspender's Authorities.*—(1.)—2. Craig, vii, 2 & 4: Juridical Styles; Bell's Styles; Russel's Convey. 157; 2. Ross, 184—(2.)—A. S. Jan. 17, 1766; 3. Ersk. ii, 16; 2. Bankt. iii, 14; Robertson's Ap. Cases, 531; 2. Ross, 192.

*Charger's Authorities.*—(1.)—2. Stair, iii, 17 & 18; 2. Bankt. iii, 40; 2. Ersk. iib, 33 & 34, and App. No. 4; Gen. Reg. of Sasines, vol. 269, p. 297. and vol. 1139, p. 369; Part. Reg. vol. 54, p. 252. and vol. 749, p. 75; Office of a Notary.—(2.)—Duke of Roxburghe, July 17, 1741, (14332); Clerk, July 7, 1752, (14333); Robertson, Jan. 7, 1742, (16955); McDonald, Feb. 14, 1778, (16956); Smith, July 14, 1816, (F. C.)

GREG & PEDDIE, W. S.—T. CRANSTOUN, W. S.—Agents.

No. 481.

J. WILSON, Pursuer.—*Forsyth.*

Mrs. A. KERB, Defender.—*Cuninghame.*

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SECOND DIVISION.

Lord Cringletie.

B.

This was a special case. It was an action by Wilson, as indorsee of a bill accepted by the late brother of the defender, whom she represented, which she alleged had been paid, and afterwards fraudulently acquired by the pursuer. The Lord Ordinary being satisfied that the defence was well founded, assolizied the defender; and the Court adhered.

D. FISHER—W. PATRICK, W. S.—Agents.

No. 482.

D. WIGHT, Pursuer.—*Rutherford.*

R. WIGHT, Defender.—*Cuninghame.*

May 23, 1822.

FIRST DIVISION.

Lord Alloway.

H.

*Arrestment—Process—Forthcoming.*—David Wight executed an arrestment on the dependence of an action,

concluding for a specific sum, and for expences. The arrestment was loosed on caution by Robert Wight, and decree was afterwards recovered, in terms of the libel. David Wight then brought a forthcoming, in which he concluded against Robert for payment of his debt, and of the expences of the action of constitution, as cautioner, in the loosing of the arrestment. The only conclusion against the arrestee was, that he 'ought to be called to this process for his interest.' Various defences were urged by Robert; and, particularly,—

1. That the summons of forthcoming was defective, as no petitory conclusions were directed against the arrestee. 2. That it concluded for the expences of the original action, which was not competent. 3. That the arrestment was inept, as the messenger did not state the place of the arrestee's residence at which the execution took place, but merely that he 'arrested in the hands of Archibald Ainslie, farmer at Peaston;' adding, that 'a just copy of arrestment, to the effect foresaid, I left for the said Archibald Ainslie, within his dwelling house, with a servant;' and, 4. That, as trustee on a bankrupt estate, he was creditor of David, and was entitled to plead compensation. The Lord Ordinary decerned against him in terms of the libel; and the Court adhered.

*Purser's Authorities.*—(2.)—3. Ersk. vi, 16; 2. Bell, 72; Wardrop, Dec. 19, 1744, (3860); 3. Ersk. vi, 8 & 24; A. S. April 29, 1695, § 23.

*Defender's Authorities.*—(2.)—Dickie, Feb. 15, 1744, (773); Wallace, July 1733, (8147).—(3.)—Adam, Jan. 14, 1626, (3746); Gulman, Feb. 21, 1693, (3752).

D. SCOTT, W. S.—TOD & WRIGHT, W. S.—Agents.

No. 483.

MARY PROVEN, Pursuer.—*Jameson*.J. BROWN, Defender.—*Maitland*.

May 23, 1822.

FIRST DIVISION.

Lord Gillies.

H.

*Title to Pursue*.—In an action of count and reckoning raised by Mary Brown against the defender, he objected to her title, on the ground, that there was an action of declarator of marriage depending against her in the Commissary Court; and that, at all events, as he was not in safety to account till that action was decided, the present one ought to be sisted. The Lord Ordinary repelled this defence, and pronounced an interim decree against him; and the Court adhered.

J. THORBURN—Æ. M'BEAN, W. S.—Agents.

No. 484.

PENTLAND and SON, Pursuers.—*Clerk—Cockburn—Hope*.BELL and Co. Defenders, et e contra.—*Forsyth*.

May 23, 1822.

FIRST DIVISION.

Lord Alloway.

H.

*Bill of Exchange—Proof*.—Pentland and Son raised action for payment of four bills, of which they were drawers, against Bell and Company, the accepters. The defence was, that the bills had been granted for the accommodation of Pentland and Sons, and that, accordingly, they had been retired by them. A counter action of reduction, on the head of fraud, was brought by Bell and Company. The Lord Ordinary, after having conjoined the actions, and allowed a condescendence by Bell and Company, took the case to report on the relevancy. On this, however, no decision was pronounced; for the Court having, before answer, remitted to an accountant to examine the books of the

parties, found that two of the bills ' appear, from  
 ' Pentland's books, to have been accommodation-bills  
 ' for his own behoof, and are entered by him in his  
 ' own hand in his books, on the same side as all other  
 ' bills payable by, and not to him : ' that to the third  
 the conclusions of the action were not applicable ; and  
 as to the fourth bill, ' in respect of the whole cir-  
 ' cumstances, and of the suspicious nature of the pur-  
 ' suer (Pentland's) books, and that he has failed to  
 ' give a satisfactory explanation thereof, before an-  
 ' swer, allow Bell and Company a proof prout de  
 ' jure of their allegations,' and, quoad ultra, assoilzied  
 them.

*Pursuers Authorities.*—Goodfellow, July 27, 1785, (1628) ; Wight, June 24,  
 1809, (F. C.)

*Defenders Authorities.*—Moses, Feb. 4, 1773, (12353) ; Smollet, Feb. 21,  
 1793, (12354).

FORSYTH & M'DOUGAL.—W. DOUGLAS, W. S.—Agents.

D. M'INNES, Pursuer.—*Jeffrey—Gillies.*

No. 485.

J. DICKIE, and M'DONALD and ELDER, Defenders.—

*Moncreiff—Ivory.*

*Reparation.*—M'Innes having been a partner of the  
 company of M'Donald and Elder, (from which he had  
 retired), diligence was raised against him, and arrest-  
 ments executed of his effects by Dickie, on a bill grant-  
 ed by the company. He presented a bill of suspension,  
 on the ground that Dickie was not an onerous bona  
 fide holder ; which was negatived, on a reference to  
 oath, and the bill refused.

May 23, 1822.

SECOND DIVISION.

Lord Pitmilley.

B.

He then brought an action of damages both against  
 Dickie and M'Donald and Elder, alleging that they



had entered into a conspiracy to ruin his credit, and had, with this view, executed diligence on the bill against him nimiously and oppressively. The Lord Ordinary assoilzied Dickie, in respect of his oath, and that no relevant ground of nimious diligence had been stated; and M'Donald and Elder, as his allegations against them were vague and inconclusive. The Court adhered.

J. M'GREGOR—J. DICKIE, W. S.—Agents.

**No. 486.** EXECUTORS OF DUKE OF QUEENSBERRY, Pursuers.—  
*Clerk—Cranstoun—Rutherford.*

C. TAIT, W. S., Defender.—*Dean of Faculty Ross—Thomson—Matheson—J. Tait.*

May 23, 1822.

SECOND DIVISION.

Lord Pitmilley.

B.

*Agent and Client—Settled Account—Retention—Interest.*—About fifty years ago, the late Mr. John Tait, W. S. was appointed cashier, commissioner, and law-agent in Scotland for the Duke of Queensberry. In 1779, his accounts were settled by a doquet, and were thereafter annually rendered. He was succeeded in the above offices by his son, the defender, in 1795, who at different periods transmitted his accounts till 1809. None of the accounts posterior to 1779 were doquetted as settled; and of those for law business only a general abstract had been sent. In 1809, the defender owed the Duke £11,912; in reference to which, and a letter from him offering to pay interest, the Duke, on the 11th of August of that year, wrote to him,—‘ I have received your letter, of this date, ‘ concerning the balances due by you since the year ‘ 1803 up to the 22d July 1809, the date of your last ‘ account, and proposing to pay interest on all these ‘ balances; and I now inform you, that I do not re-

‘ quire you to pay interest on the balances of your  
‘ accounts to Candlemas 1806 inclusive, (which, ac-  
‘ cording to your statement, would amount to near  
‘ £500); but I shall expect interest from Candlemas  
‘ 1807 on the large balance then due, and on all the  
‘ subsequent balances on your accounts up to the 22d  
‘ July last; and I have directed Messrs. Thomas  
‘ Coutts and Company to take such security from  
‘ you as they shall think necessary for the interest  
‘ above mentioned, and also for the balance due on  
‘ the 22d July last; such security to be payable by  
‘ you, with interest, on the 22d July 1810:’ and, in  
a letter to Coutts and Company, he desired them to  
take Mr. Tait’s bill for £11,912, ‘ being the balance  
‘ of account due by Mr. Tait on that day.’ For this  
sum, and interest, the defender granted and retired  
his bill.

In the course of the year 1810, the tenants on the  
Duke’s entailed estates having become alarmed for  
the validity of their leases, which had been called in  
question by the next heir of entail, the Duke agreed  
to place £50,000 within Scotland, as an attachable  
fund for damages; and the defender interposed his  
personal obligation as guarantee. This sum was,  
in April of that year, lent to the defender on an he-  
ritable bond, by which he bound himself to pay the  
interest half yearly in London. The Duke died in  
December thereafter; and, in 1816, his executors rais-  
ed an action against the defender, concluding,—1.  
For a general count and reckoning; and, 2. For pay-  
ment of the heritable debt. After unsuccessfully at-  
tempting to adjudge his estate, they demanded con-  
signation, which the Court refused, in respect that

the defender had a lien over the money in his hands till relieved of his guarantee, but (11th July 1817) ordered the interest to be accumulated into a capital sum. In the above action two points arose,—1. Whether the law-accounts rendered by the defender and his father between 1779 and 1809 were still open to objection? and, 2. Whether the executors were entitled to form the interest on the heritable debt, as it fell due, into a capital sum, and to charge interest on it? On the first of these points the defender contended, that except as to errors in calculation, the accounts were now closed by the lapse of time, by the letter of the Duke in 1809, and the bill for the balance. But the Lord Ordinary found, ‘ that the ‘ accounts for law-business prior to 22d July 1809 ‘ cannot be held as having been settled by the late ‘ Duke of Queensberry, but are still subject to be ‘ audited and adjusted ; and that all the defender is ‘ entitled to demand with regard to them is, that in ‘ the auditing of the old accounts, the same strict ‘ rules shall not be enforced which are applied in law ‘ and practice to an accounting of more recent date ;’ and to this interlocutor the Court (16th January 1821) adhered. In reference to the second point, the defender maintained,—1. That interest upon interest was not warranted by law ; and, 2. That he was not in mora, as he was not bound to pay any part of the money till he had been freed from his guarantee. The Court, however, held, that although the defender was entitled to retain the money as a security for his relief, yet he could not be allowed to make profit of it ; and, therefore, found, ‘ that the interest ‘ falls to be accumulated annually from and after the

' 11th day of July 1817, the date of the last accumulation of interest, and that at the rates of interest allowed for the time by the public chartered banks upon deposit accounts.'

*Pursuer's Authorities.*—(2.)—Calliot, 2. Anstr. 495; Hamilton, Feb. 25, 1813, (P. C.); Lord Montgomery, April 1816, Dow, 128; Raphael, 2. Vesey, 92.

*Defender's Authorities.*—(1.)—Mad. Rep. 80; Brownell, 2. Brown, 62. —(2.)—2. Bell, 93; 3. Ersk. iii, 81; Waring, 1. Vesey, 99; Everard, 2. Brown, 59; Thornhill, 2. Atkyns, 330; Tew, 1. Vesey, 451.

H. DONALDSON, W. S.—W. CLARK, W. S.—Agents.

A. WILSON and Others, Suspenders.—*Moncreiff—Menzies.* No. 487.

W. PATERSON and Others, Chargers.—*Jardine.*

46. Geo. III. c. 65—*Property Tax—Friendly Society.*—Wilson having been charged on his bond for £100 to the Horse-setters Society; presented a bill of suspension, alleging that he was entitled to retain part of it in compensation of property-tax, which he had neglected to deduct from interest formerly paid. To this it was answered, that the society fell under the exception of § 103 of the 46. Geo, III. c. 65, exempting friendly societies from payment of property-tax. The Lord Ordinary refused the bill; but the Court passed it, upon consignment.

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Bill-Chamber.

Lord Meadowbank.

D.

CAMPBELL & BURNSIDE, W. S.—J. BLAIR, W. S.—Agents.

J. PITCAIRN, Pursuer.—*Skene;*

D. DRUMMOND, Defender.—

No. 488.

May 24, 1822.

FIRST DIVISION.

Lord Alloway.

H.

*Submission—Powers of Arbiters.*—After Pitcairn had obtained and extracted decree of removing, on the

26th of February 1812, against his tenant, Drummond, on the Act of Sederunt 1756, he allowed him to remain in possession till Martinmas of that year. On the other hand, Drummond bound himself to remove at that term, renounced his lease for the remaining years, and declared that the renunciation should 'in noways hurt or invalidate, but shall, on the contrary, corroborate and strengthen the aforesaid decree.' At the same time, and by a separate deed, the parties agreed 'that every obligation incumbent on the tenant, and every obligation incumbent on the proprietor, either as constituted by the present leases, or otherwise, shall, if these parties cannot adjust them, be made the subject of reference.' Accordingly, they afterwards entered into a submission of 'all claims, questions, disputes, and differences of every kind, depending and subsisting between them, upon any account, transaction, or occasion whatever, preceding the date hereof.' The arbiters decerned in favour of the tenant for a large sum, in respect that the lands had been greatly meliorated by him, and 'the benefits arising from which had been and would continue to be reaped by the proprietor for the unexpired period of the lease, being thirteen years from the term of the tenant's removal.' Of this decree Pitcairn brought a reduction, on the ground that the arbiters had exceeded their powers, in awarding a sum for the future value of the farm, to which he had right under the extracted decree of removing. But the Lord Ordinary assoilzied Drummond, in respect 'that iniquity or injustice, however apparent, affords no ground for setting aside a decree-arbitral: that the submission was sufficiently ample to include every subject

‘ of claim or dispute which existed betwixt the parties; and that, in the agreement which was subscribed by the parties when the renunciation was granted, every obligation incumbent on the proprietor, as constituted by the leases or otherwise, was referred to arbitration, if the parties themselves could not adjust them; and the submission afterwards entered into by the parties was sufficiently broad to embrace all the points decided by the decree-arbitral.’ The Court refused a petition, without answers.

*Purser’s Authorities.*—4. Ersk. iii, 32; Steele, June 22, 1809, (F. C.)

G. VEITCH, W. S.—CAMPBELL & ARNOTT, W. S.—Agents.

BERRY’S REPRESENTATIVES, Advocators.—*Clerk—*  
*More.*

No. 489.

R. WIGHT, (CAIRNCROSS’S Trustee).—*Rutherford.*  
*and*

J. BOGLE, Defenders.—

*Triennial Prescription—Statute 1579, c. 83.—*

May 24, 1822.

Berry had been employed by Hugh Cairncross to execute the plaster work of a house which he and Bogle and Company had contracted to build at Ardgowan, and a balance was due to Berry in 1800. Subsequently he became indebted on a different transaction to Cairncross, and, after his death, also to his son, George. The estates of George having been sequestrated, his trustee, in 1812, raised an action in the sheriff-court against Berry for payment of the debts due to the son and father. Berry pleaded compensation on the balance due in 1800; against which the triennial prescription having been objected, he re-

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Lord Alloway.  
D.

ferred his claim to the oath of the son, whose deposition amounted only to a nihil novit. The Sheriff pronounced decree against him, of which he brought an advocacy; and instituted an action against Bogle, the representative of Bogle and Company, as a partner in the building contract with H. Cairncross, for payment of the balance. Bogle pleaded prescription, and that, by the reference to oath, Berry was precluded from farther evidence. But the Lord Ordinary, after conjoining the actions, sustained the plea of compensation, and decerned against Bogle, in respect that, ' by the documents recovered from Messrs. Boggles, ' it is instructed that they kept the books and advanced the money payable to the tradesmen under ' the Ardgowan contract, and that it does not appear, ' from the accounts in their books, that the pursuer, ' Berry, has received more money than the sums for ' which he has given credit; and that, therefore, if ' the work performed by him amounted to the sum ' stated, the balance claimed by him is still due, and ' that both the defender, Bogle, and Cairncross, or ' his representatives, are liable to him for the amount ' thereof: that the pursuer is not barred by the oath ' of G. Cairncross (the son) from recovering the ' amount of his claims from the persons engaged in ' the original contract, and who are bound to settle ' with him for the amount of his work.' The Court at first altered this interlocutor; but after a remit to an accountant to examine the books of Bogle and Company, and a hearing in presence, they found a balance was still owing to Berry.

One Judge observed, that the triennial prescription was not applicable; and another, that even though it were,

yet the books of the company afforded sufficient evidence of the existence of the debt.

*Pursuers Authorities.*—4. Ersk. ii, 14 : Leslie, Nov. 15, 1808, (F. C.)

*Defenders Authorities.*—Bayne, Dec. 21, 1692, (11092); Tweedie, June 8, 1694, (11092); Ross, Nov. 19, 1784, (11115); Douglas, Nov. 18, 1794, (11116).

G. WILSON—D. MACNEILLIE, W. S.—MACMILLAN & GRANT,  
W. S.—Agents.

J. G. FISCHER, Pursuer.—*Thomson—Jeffrey—Fullerton—Murray—Simpson.* No. 490.

EARL of SEAFIELD and CURATOR, Defenders.—*Clerk—Cranstoun—Moncreiff—Cockburn—Sir W. Hamilton.*

*Personal Objection—Vicious Intromission—Foreign Presumption.*—The late Earl of Seafield, after a residence abroad of twenty years, died near Dresden on the 5th October 1811, possessed of heritable and moveable property to a large extent, both in Germany and Scotland. In 1796, he executed, at Halle, a general deed of settlement, in the Scottish form, by which he conveyed his whole estates, both real and personal, together with (in usual style) the title-deeds of his heritable property, and the vouchers of debts and money due to him, to Sir James Grant and his heirs, under the burden of his liferent, debts, legacies, and power to alter and burden, and nominated Sir James his sole executor. In 1804, the Earl made a deed of donation mortis causa, also in the Scottish form, of his whole property situated out of Great Britain, to his private secretary, J. G. Fischer, declaring it a burden on the settlement of 1796. This deed was, according to certain German rules, accepted by Fischer, and judicially ratified before the Bailliage of

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M'K.



Dresden. The Duke, in 1806, converted it into a donation inter vivos, so far as regarded the immoveable property; and, at the same time, he confirmed the donation mortis causa of the moveable effects, declaring that, after his decease, Fischer, 'en doit être regardé le seul et legal propriétaire, et en plein droit de s'en mettre en possession, et d'en disposer comme de son bien propre et legalment acquis.' In the course of the same year, (1806), he deposited his settlement of 1796, with several codicils, in the Bailliage of Dresden, of which he gave the receipt to Fischer, with power to *publish*\* them on his death. On the day on which this event happened, Fischer obtained publication of these deeds,—found that large legacies had, by the codicils, been left to him, and immediately took possession of all the Earl's effects. The defender, as the representative of Sir J. Grant, having succeeded to the estates in Scotland, under the settlement 1796, Fischer brought an action against him, concluding,—1. For payment of the legacies. 2. For the contents of a promissory-note by the Earl; and, 3. For relief of a debt constituted on the heritable property conveyed by the donation inter vivos. Against this action the chief defences were,—1. That the claims arose *ex turpi causa*. 2. That, at all events, they were barred, by Fischer having, without judicial authority, intromitted with the papers and effects of the late Earl; and, 3. That the donation inter vivos was a simulate and trust-deed, executed with a view to protect the property of the Earl from seizure by the French; and that, in the circumstances on which the second defence was founded, this must be presumed. On the report of

\* A German form.

the Lord Ordinary, the Court, before answer, allowed the defenders a proof of their averments, 'in regard to the pursuer's behaviour on the death of the late Earl of Findlater, by taking possession of the keys of his Lordship's repositories, and whole papers and writings therein contained, along with his whole other effects within the reach of the pursuer;' and to condescend on what is the law of Saxony in regard to such conduct, and to the alleged donatio mortis causa in Fischer's favour. From the proof, it appeared that, immediately on the death of the Earl, which occurred in the morning, Fischer took possession of his keys, and particularly of a bureau, in which the Earl kept papers:—that, in the course of the same day, he, under the inspection of the Earl's German agent, opened the bureau, which, along with some other things in the Earl's bed-chamber, he caused the servants to carry into his own apartment; and that, in the afternoon, he announced the Earl's death to the Bailliage, when he published his will, and was informed that it was not necessary, in the situation in which he stood, to seal up the effects. It was contended by the defenders, that these circumstances formed a bar, according to the law of Scotland, against Fischer's action: But the Court, after a hearing in presence, and advising memorials, repelled 'the defence founded on the facts relating to the conduct of the pursuer in taking possession of the papers belonging to the late Earl of Findlater at the time of his death, so far as such defence is rested exclusively on the law of Scotland;' but ordered the opinion of the Faculty of Law in the Uni-

versity of Leipsic to be obtained as to the effect of the law of Saxony.

The general import of this opinion was,—1. That Fischer was entitled, in virtue of the deeds in his favour, to take possession of the Earl's papers and effects, without any judicial procedure; and, 2. That even where such procedure is necessary, and has not been observed by the legatee, he does not ipso facto forfeit his right to claim on testamentary deeds. The Court, on advising this opinion, and a petition against the above judgment, again repelled the defence, 'whether such defence be rested on 'the law of Scotland or the law of Saxony;' but allowed a special condescendence of the facts alleged as to *turpis causa*,

Their Lordships held that this case was to be decided by the rules of the law of Saxony alone; but, at the same time, observed, that as the defenders did not allege the existence of any deed of revocation, the law of Scotland did not presume that there had been such a deed, from the mere circumstance of a party intronitting irregularly with the papers and effects of a defunct.

*Defenders Authorities*.—Masc. Con. 825, n. 1; Stat. 1672, c. 72; A. S. Feb. 23, 1692; Dick, Nov. 17, 1737, (Elchies, No. 11, Presump.); Hub. Prelect. 1, t. 3; Gowan, Dec. 10, 1790, (4476); Kinloch, July 12, 1739, (4446); Buchanan, Nov. 4, 1704, (Dair. 63); Dig. L. 29, t. 6; Voet, *ibid*; Code, 6, 34; Masc. Con. 193; Kames' P. of Eq. i, 1, c. 7, and c. 9.

D. CLEGHORN, W. S.—MACKENZIE & INNES, W. S.—Agents.

W. FYFE, Boxmaster of the Tailors of Aberdeen, No. 491,  
Advocator.—*H. J. Robertson.*

J. MOWAT and COMPANY, Respondents.—*Buchanan.*

*Advocation*—*Stat. 50. Geo. III, c. 112.*—This was May 25, 1822.  
a question as to passing a bill of advocation. An  
action had been raised in the inferior court by the FIRST DIVISION.  
Incorporation of Tailors in Aberdeen against one Lord Meadowbank.  
Stott, for encroaching on their privileges, and con-  
cluding for fine and interdict. He pleaded, that he  
was employed by Mowat and Company, who he al-  
leged were freemen, of which a proof was allowed.  
The inferior court afterwards decerned against him ;  
but, on an appeal to the Circuit Court, a remit was  
made to call Mowat and Company as parties, which  
was done. They were assolizied ; and, on a second  
appeal, the case was remitted, with instructions,  
reserving all questions as to expences. The inferior  
court again assolizied them, and, on an application by  
the Incorporation, gave leave to advocate. Nothing  
was said in the interlocutor as to expences ; and when  
the bill of advocation was presented, it was objected  
to as incompetent, on the ground, that the question  
of expences was still undisposed of. The Lord Or-  
dinary refused the bill ; but the Court passed it, un-  
der reservation of the claim for expences,

J. MORRISON, W. S.—J. J. FRASER, W. S.—Agents,

F. LAUDER, Pursuer.—*Robertson.*

C. FRASER, Defender.—*Wilson.*

No. 492,

May 28, 1822.

*Interim-Decree.*—In this case, the Lord Ordinary  
had granted interim-decree for £50, ' in respect that

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D.

‘ the debt claimed by the pursuer is instructed by  
 ‘ the vouchers produced to a much greater amount  
 ‘ than the interim-sum decerned for.’ The defender  
 reclaimed, alleging that he had raised a counter  
 action for a sum of damages, which exceeded the  
 debt sued for ; but the Court adhered.

F. LAUDER—R. CAIRNS—Agents.

No. 493.

J. THOMSON, Advocate.—*Cockburn—Hope.*

J. MILTON, Respondent.—*Mare.*

May 28, 1822.

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H.

*Advocation—50. Geo. III, c. 112.*—Milton, who held a patent as the inventor of a particular kind of weaving, raised action in the sheriff-court against Thomson for a violation of it. Thomson denied that he had ever made use ‘ of any of the pretended inventions of the petitioner, as described ‘ in the complaint and specification.’ The Sheriff allowed the parties a proof in common form; and after a number of witnesses had been examined on both sides, Thomson adduced one to shew that Milton was not the original inventor. This was objected to; and the Sheriff found, that, in respect ‘ of ‘ litiscontestation having taken place, and proof been ‘ adduced for both parties, it is not now competent ‘ for the defender to go into a proof of a defence not ‘ previously stated ;’ but allowed him to advocate, on the head of ‘ legal objection to the mode of proof.’ The advocacy was opposed as incompetent, because the Sheriff had not decided any thing relative to the admissibility of any particular species of evidence, but merely as to the competency of a defence brought forward after litiscontestation. The Lord Ordinary

repelled the objection to the advocacy; and the Court adhered.

*Respondent's Authority.*—Berry, Dec. 16, 1815, (F. C.)

W. DOUGLAS, W. S.—A. NAIRNE—Agents.

D. MATHIE and J. and D. M'GOWN, Complainers.— No. 494.

*Moncreiff—Fullerton—Hope.*

J. M'GAVIN, A. FERRIE, and J. B. GRAY.—*Jeffrey—*

*More,—and*

D. HAMILTON, Respondents.—*L'Amy.*

*Bankrupt.*—In August 1816, the estates of J. and D. M'GOWN were sequestrated, and M'Gavin was appointed trustee. Prior to the sequestration, Mathie had guaranteed several of the debts due by the bankrupts; and having been afterwards called on to pay them, he raised an action in the inferior court, on a bill accepted by Ferrie in favour of the bankrupts, and which they had indorsed to him in relief. Ferrie's defence was, that the bill was accepted by him for the accommodation of the bankrupts: that, on their representation that it had been lost, he had given another in lieu of it, which he had been obliged to pay; and that Mathie was not an onerous bona fide indorsee. Having failed to prove this defence by Mathie's writ or oath, decree was pronounced against him on 26th October 1821. Ten days thereafter, an order was served on the bankrupts by the trustee to appear for examination, on the 12th of November, relative to this bill. They obeyed this

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S.

order under protest, and underwent an examination on that and the following day. Against this proceeding both they and Mathie presented a petition and complaint, in which the latter alleged that it had been resorted to in collusion with Ferrie, to enable him successfully to advocate the action against him : that the trustee had, accordingly, left the examination of the bankrupts to Ferrie and his private agent, Gray ; and that the Sheriff had neglected his duty, in allowing the latter to dictate the record. On the part of the bankrupts it was alleged, that the examination was incompetent, as, 1. They had emitted the statutory oath, and were entitled to have got written interrogatories ; and, 2. That, in the meanwhile, they had been sequestrated and discharged as individuals under the firm of J. M'Gown and Company. It was, therefore, prayed that the declaration should be expunged, and any future examination prohibited, and all parties punished. In defence, the trustee alleged that there was no collusion : that the sequestration of J. and D. M'Gown was still in existence : that Mathie was a conjunct and confident person ; and that, as trustee, he was bound to make every inquiry, so as to protect the estate against a claim put in by Ferrie under the bill, the more especially as he held a preferable security over the estate, which would render it necessary to call on the other creditors to repeat dividends which had been paid to them. By Ferrie it was maintained, that, being a creditor, he was entitled to be present at the examination,—by Gray, that he had been employed by the trustee to act as agent,—and by the Sheriff, that he had performed his duty. The Court dismissed the

complaint, with expences, but ordained a meeting of the creditors to be called on the subject.

*Complainers Authority.*—2. Bell, 506, 425.

*Respondents Authority.*—2. Bell, 429, 424, 492.

G. NAPIER—W. & A. G. ELLIS, W. S.—Agents.

R. HILL, Petitioner.—*Maidment.*

No. 495.

J. CAMPBELL, Trustee for THOMSON and Others,  
Respondents.—*Alison.*

The Court recalled an inhibition executed against Hill's estate, on condition that he implemented the decree of the Court for consignment. (See No. 161.)

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M'K.

R. HILL, W. S.—CAMPBELL & ARNOTT, W. S.—Agents.

W. WILSON, Pursuer.—*Greenshields.*

No. 496.

DUKE of HAMILTON, Defender.—*Jardine.*

*Settled Account.*—In an action of accounting at the instance of Wilson against the Duke of Hamilton, the Court had remitted to the Lord Ordinary to allow a condescendence of certain errors alleged by Wilson to exist in settled accounts, on which the Duke rested his defence. The Lord Ordinary assoilzied the Duke, in respect that Wilson had failed to condescend specifically and relevantly; and the Court refused a petition.

May 29, 1822.

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Lord Gillies.

D.

J. JOHNSTONE—R. RUTHERFORD, W. S.—Agents.



No. 497.

A. Low, Suspender.—*Gillies*.J. M'GRUTHER, Charger.—*M'Farlane*.

May 29, 1822.

**FIRST DIVISION.** This was a question of accounting, in which no general point occurred. The inferior court having decerned against Low, he suspended, on special reasons, which the Lord Ordinary repelled; and the Court adhered.

S.

J. M'ARA, W. S.—TOD &amp; WRIGHT, W. S.—Agents.

No. 498.

A. CRAIG, Suspender.—*Hope*.W. BUDGE, Charger.—*Moncreiff*—*J. W. Dickson*.

May 29, 1822.

**FIRST DIVISION.** *Jurisdiction*—*Stat. 48. Geo. III, c. 110, and 55. Geo. III, c. 94.*—Budge and others, fishers, under Lord Meadowbank, took, by the following missive, to fish on behalf of H. Craig, a fish-curer.

' Agreement for fishing, 1819.—*Wick, 12th March*  
' 1819. Agreement between, &c. fishers, at the rate  
' of 18s. sterling per cran, and salt for curing five  
' barrels of fish to each boat, in full of all perquisites;  
' and to receive 200 crans from each boat, if you fish  
' them.' On this missive Budge raised an action  
before the Sheriff, for payment, against Craig, who  
declined the jurisdiction, alleging that this was a maritime contract, subject only to the jurisdiction of the Admiral. In answer, Budge relied on the 48. Geo. III, c. 110, and 55. Geo. III, c. 94, relative to the regulation of the herring fishery. The Sheriff repelled the objection; and the Lord Ordinary and the Court, in a suspension, adhered to that judgment.

*Suspender's Authority.*—*1. Ersk. iii., 33.*

D. CLYNE—

—Agents.

Sir W. F. ELLIOT, Pursuer.—*Clerk—Ro. Bell—* No. 499.  
*Wood.*

G. POTT, Defender.—*More.*

*Bona et Mala Fides.*—Sir W. F. Elliot, in 1812, May 30, 1822.  
 succeeded to the entailed estate of Stobbs; and, with- FIRST DIVISION.  
 in six months thereafter, he brought an action, con- Lord Meadowbank.  
 cluding for reduction of a lease granted by his father, H.  
 the preceding heir, to the defender, Pott, as a contra-  
 vention of the entail, and also for removing. The  
 Court having assoilzied the defender,\* Elliot appeal-  
 ed to the House of Lords, who reversed the judg-  
 ment on 10th March 1821, reduced the lease, and  
 remitted back the remaining points of the case. One  
 of these was, From what date was the defender to be  
 liable in violent profits? The Lord Ordinary found,  
 that ' the defender can be considered in mala fide, in  
 ' possessing the farm in question; only from the date  
 ' of the judgment of the House of Lords; and that  
 ' the defender is; therefore, not liable to account for  
 ' violent profits for crop 1820 and preceding crops;'  
 and the Court refused a petition, without answers.

*Pursuer's Authorities.*—2. Stair, i. 23; 2. Ersk. i. 25, 26, 29; Grant, Nov.  
 16, 1633, (1743); Cockburn, Feb. 12, 1697, (1732); Cuninghame, Feb.  
 19, 1635, (1739); Miln, July 19, 1715, (1759); Oliphant, Nov. 30,  
 1790, (1721); Wedgewood against Catto, June 13, 1820, (Not rep.); Thom-  
 son, Feb. 17, 1624, (1737); Lealy, Feb. 13, 1745, (1723).

*Defender's Authorities.*—Jackson, July 3, 1811, (F. C.); Duchess of Rox-  
 burgh, Feb. 17, 1815, (F. C.); Henderson, Dec. 14, 1815, (F. C.);  
 Turner, March 3, 1820, (F. C.)

W. BELL, W. S.—J. POTT, W. S.—Agents.

\* See Fac. Coll., 10th March 1814, No. 166.

H h

No. 500. J. CAMPBELL, Pursuer.—*Greenshields—Cockburn*.  
R. MONTGOMERY, Defender.—*Jeffrey—Cuninghame*.

May 30, 1822.

FIRST DIVISION.

Lord Alloway.

D.

*Transaction—Settled Account—Writ.*—The late R. Campbell appointed Montgomery his executor ; in which character various claims were made against him by the pursuer, who was the brother of the deceased. After a long correspondence, the pursuer granted Montgomery a full receipt and discharge, in consideration of a certain sum. Of this discharge he afterwards raised an action of reduction, on the grounds,—1. That it was not executed in terms of the act 1681 ; and, 2. That Montgomery had fraudulently concealed from him certain claims to which he had right, particularly in relation to a ship called the Lark ; and he concluded for a general accounting. The Lord Ordinary, after ordering a condescendence, assolizied Montgomery, in respect ‘ the pursuer has ‘ not condescended on any facts or circumstances ‘ with which he was not acquainted at the date of ‘ the discharge ;’ and that ‘ the allegations made ‘ with regard to the Lark are so vague and uncertain, as not to afford room for opening up a settlement or compromise of all the claims, on the head ‘ of fraud ;’ and the Court adhered.

*Pursuer's Authorities.*—(1.)—Ross, Jan. 23, 1711, (16867) ; Short, July 3, 1711, (16867) ; Russell, Dec. 17, 1766, (16904).

J. PRINGLE, W. S.—W. PATRICK, W. S.—Agents.

W. CARRICK, (Trustee of AUCHIE and COMPANY), No. 501.

Pursuer.—*Bell—Alison.*

ASSIGNEES of DICKIE, Defenders.—*Jeffrey—Boswell.*

*Retention.*—Dickie of London consigned goods to Dollar, Auchie, and Company of Jamaica, a branch of Auchie and Company in Glasgow, and received partial advances on them; and Oliphant, also of London, made similar consignments. Commissions of bankruptcy were afterwards issued against both these persons, and a sequestration was awarded against Auchie and Company. At this time, Dickie was creditor of Auchie and Company for upwards of £1,500, while Oliphant was indebted to them about £400. A competition having arisen for the funds belonging to Dickie in the hands of Auchie and Company, their trustee raised a multiplepoinding before the Magistrates of Glasgow, in which he claimed right to retain out of these funds the debt due by Oliphant to Auchie and Company, in respect, 1. That the consignments formed part of a joint adventure, in which he and Dickie were interested; and, 2. That Dickie had, prior to his bankruptcy, assigned to Oliphant all his consignments; and that although the assignation had not been intimated till posterior to the commission against Dickie, yet as it was an English deed, and the goods were locally situated in Jamaica, it was effectual from its date. On the part of Dickie's assignees, it was denied that there had been a joint adventure; and it was pleaded, that as the advances had been made by Auchie and Company of Glasgow, and the goods sent under their direction to the branch in Jamaica, where they remained

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H.

under their controul, they must be held as within Scotland; and that, consequently, intimation was requisite. Carrick having failed to prove the joint adventure, the inferior court repelled the plea of retention; and, in an advocacy, the Lord Ordinary and the Court adhered.

*Pursuer's Authorities.*—(1.)—2. Bell, 521.—(2.)—3. Ersk. xxi. 40; 2 Bell, 65; 1. Cooke's B. L. 403; 1. Bac. Ab. 437.

*Defenders Authorities.*—(1.)—2. Bell, 631, 633, 636.—(2.)—Maitland, March 4, 1807, (No. 26, Ap. Bankrupt); Egerton, Nov. 27, 1812, (F. C.); Craigie, June 12, 1817, (F. C.)

TENNENT & LYON, W. S.—A. BOSWELL, W. S.—Agents.

No. 502.

W. DRUMMOND, Advocate.—*Rutherford.*  
J. Dow, Respondent.—*J. Henderson, jun.*

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Bill-Chamber.  
Lord Craigie.  
B.

Decree in the inferior court having been pronounced against Drummond, he presented a bill of advocacy on certain special grounds, and an alleged contingency, with an action at his instance in the Court of Session. The Lord Ordinary and the Court refused it, in respect of no caution.

W. Renny, W. S.—J. GILLON,—Agents.

No. 503.

J. BROWN, Suspender.—*Jeffrey—More.*  
W. ROBERTSON, Charger.—*Cranstoun—Keay—Jameson.*

May 31, 1822.

FIRST DIVISION.  
Bill-Chamber.  
Lord Kinnedder.  
D.

*Landlord and Tenant.*—Brown having got a lease of a house in Princes Street, sublet the under or area flat, at an advanced rent, to Robertson, who then possessed it as a tavern. In order to make a door and some other alterations in the flat immediately

above, Brown proceeded to erect scaffolding in the area immediately opposite to Robertson's door and windows, and to form a *plat* or communication from the street. Against this, Robertson presented a bill of suspension and interdict, alleging that the effect of the scaffolding was entirely to interrupt his business, by rendering his door inaccessible, and that the *plat* would intercept the light of his windows. The Lord Ordinary, after visiting the premises, granted an interdict against the formation of the *plat*, but refused it quoad ultra. The Court refused a petition by Brown; but, on one from Robertson, they remitted to the Lord Ordinary to grant the interdict, as craved by him.

D, CLEGHORN, W. S.—D. BRASNE,—Agents.

A. HOUSTON, Pursuer.—*Moncreiff—Gillies.*

No. 504.

WILLIAM YUILL, Defender.—*Cockburn.*

*Sexennial Prescription—Bill of Exchange.*—On the 29th November 1806, George Maxwell, John Yuill, and Walter Yuill accepted a bill for £100, payable on demand to Houston, who, on the 3d June 1819, raised action on it against the defender, as the representative of Walter Yuill. He pleaded the sexennial prescription. In answer, Houston founded on various markings of payment of interest on the back of the bill by *Maxwell*, the latest of which was dated 20th May 1815; on a letter by him, dated 24th November 1817, admitting that the bill was still unpaid; and on the circumstance of having ranked on the bankrupt estate of *John Yuill*, and drawn a dividend, without objection, a short time before the action

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Lord Pitmilley.

B.

was instituted; and maintained, that these acknowledgments by the other two accepters of the bill being resting owing, elided the plea of prescription. The Lord Ordinary, however, sustained the defence; and the Court adhered.

*Pursuer's Authorities*.—1. Bell, 306; 2. Bell, 253; 2. Stair, xii, 26; 2. Bankt. xii, 64; 3. Ersk. vii, 46; Nicolson, Dec 18, 1667, (11233); Grant, July 21, 1784, (11283); Gordon, Nov. 23, 1784, (11127).

*Defender's Authorities*.—Fergusson, March 7, 1811, (F. C.); Allan v. Ormiston, June 25, 1816, (Second Division, Not rep.)

D. GIBSON—M'CHEYNE & MACGLASHAN,—Agents.

No. 505. S. MARQUIS and Husband, Pursuer.—*Moncreiff*.  
D. MARQUIS and Others, Defenders.—*Ro. Bell*.

June 1, 1822.

FIRST DIVISION. *Process—Reduction*.—The Lord Ordinary having, in an action of reduction of a testament, on the head of forgery, pronounced decree of certification and reduction against the defenders for not producing it, they reclaimed, alleging that it had been accidentally lost, and that they had raised a proving of the tenor, and prayed for a reservation of the decree which they might obtain in that action. But the Court refused the petition, as unnecessary, seeing that if they succeeded in proving the tenor, they might bring a reduction of the decree.

D. CLEGHORN, W. S.—W. BELL, W. S.—Agents.

No. 506. FLESHERS of ABERDEEN, Advocators.—*Baird*.  
A. WILLIAMSON and Others, Respondents.—*Rutherford*.

June 1, 1822.

SECOND DIVISION. *Corporation—Stat. 1703, c. 7—Burgh Royal*.—A Bill-Chamber. complaint was made by the Corporation of Fleshers of Lord Meadowbank.

B.

Aberdeen against Williamson and others, for encroaching on their privileges, by slaughtering and selling cattle within the burgh. The defence was chiefly rested on the statute of Queen Anne, 1703, c. 7, which declares, 'that it shall be lawful to all persons whatsoever to sell and break all sorts of flesh on every lawful day of the week, and that in all the burghs and towns of this kingdom, free of any imposition whatsoever, the petty custom of burgh excepted.' By the corporation it was alleged, that the power to *break* entitled only to cut up the dead carcase, and not to *slaughter*. The inferior court assailed the defenders; and the Lord Ordinary refused a bill of advocation. But the Court, on an offer to prove that for more than forty years the corporation had possessed the exclusive right, under their seal of cause, of slaughtering, remitted to pass the bill.

*Advocators Authorities.*—Skirving, Jan. 19, 1803, (10921); 1424, c. 39; 1592, c. 153.

*Respondents Authorities.*—Coopers of Perth, July 8, 1752, (1938); Maltmen of Glasgow, Feb. 10, 1749, (1934); Hammermen of Canongate, Dec. 11, 1807, (No. 18, App. Burgh Royal); Bakers of Perth, July 5, 1808, (No. 22, ib.) Wrights of Glasgow, Feb. 24, 1809, (F. C.); Corporation of Maccles, Feb. 16, 1813, (F. C.); Wrights of Portsburgh, Jan. 22, 1818, (F. C.)

J. MORRISON, W. S.—W. DUTHIE, W. S.—Agents.

J. MITCHELL, Suspender.—*Small Keir*.

E. MITCHELL, Charger.—*Jameson*.

No. 507.

*Compensation.*—This was a suspension of a charge on a decree-arbitral, on a plea of compensation. The Lord Ordinary refused the bill, 'in respect that the

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H



' sums charged for are found due by a regular decree-arbitral, to which no legal objection is taken, and that the reasons of suspension are founded upon claims altogether illiquid.' And the Court refused a petition, but allowed a reference to oath.

BROWN & LAWSON, W. S.—

—Agents.

**No. 508.** PEASE, WRAYS, and TRIGG, Pursuers.—*Blackwell—Marshall.*

SMITH and JAMESON, Defenders.—*Bell—Greenshields.*

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S.

*Mandatory—Foreigner—Process.*—Smith and Jameson brought an action against Pease, Wrays, and Trigg, English merchants, who, along with Hay, as their mandatory, raised a counter action of damages, which was conjoined with the former. After considerable litigation, the Court assoilzied Smith and Jameson, and found them entitled to expences. At this stage, Hay having died, Pease, Wrays, and Trigg gave a new mandate to D. and A. Thomson, W. S., who, however, entered a minute on record, protesting that they should not be liable for the expences previously incurred. Appearance was, under this mandate, made for them, to answer certain objections to the auditor's report; but the Court found, that ' the mandate produced, as qualified by the said last-mentioned minute, is not sufficient to entitle the ' mandatories to appear in the conjoined actions in ' question.'

*Pursuers Authorities.*—Howden, Jan. 14, 1818, (F. C. App.); Leigh, Dec. 19, 1792, (4645).

*Defenders Authorities.*—Pringle, June 16, 1738, (4643); Potter, July 25,

1739, (4644); O'Haggan, July 31, 1761, (Ib.); Irvine, June 1765, (Ib.); Hope, Feb. 8, 1780, (Ib.); Hope, June 10, 1797, (4646).

D. & A. THOMSON, W. S.—J. WEMYSS, W. S.—Agents.

LADY MONTGOMERIE and HUSBAND, Pursuers.—*Clerk*  
—*Cranstoun—Murray—Jameson.*

No. 509.

J. WAUCHOPE, Defender.—*Irving—Moncreiff—*  
*Forbes,*

*Factor—Tutor and Pupil—Trustee and Constituent*  
*—Annualrent—Adjudication.*—The late Archibald Earl of Eglinton was possessed of large entailed and unentailed heritable estates and extensive moveable property. By a deed of settlement, he conveyed his unentailed estates to Mr. Wauchope, (who had been his law-agent and cashier), and to certain other persons, as trustees, appointed them his executors, and authorized them to name factors. He likewise, by a separate deed, nominated them tutors and curators of his two daughters. In 1796, he died; and the trustees, after employing a factor to collect the rents, granted commissions to Mr. Wauchope to act as their law-agent and cashier, and to do every thing which was competent to them as trustees, tutors, or executors. Accordingly, under those powers, Mr. Wauchope, between the years 1796 and 1806, drew large sums from the different estates, during which time he only occasionally brought his accounts to a balance by the aid of accountants. In 1807, Lady Montgomerie, the sole surviving daughter, raised an action of multipointing and of exoneration in name of the trustees and tutors and curators; and Mr. Wauchope having produced his accounts, she objected,—1. That he ought to have balanced his accounts annually,

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H.

2. That he was accountable for the profits made on large balances arising from the savings of the estate, which he had unnecessarily kept in his own hands.

3. That, at all events, he was liable for three per cent., *de die in diem*, on his accounts, and for five per cent. from three months after each annual balance.

4. That he was not entitled to the expence of making up certain titles, which she alleged were null, being, by adjudications in implément, deduced upon a special charge to enter heir against the representative of the parties who granted the obligations on which the adjudications were founded, but without a previous charge to enter heir in general, or a decret of constitution ; and,

5. That he could not take credit for sums paid to accountants for making up his accounts, as he ought to have done this himself.

On the report of the Lord Ordinary, the Court (2d July 1812) found, ‘ that Mr. Wauchope’s accounts must still be brought to an annual balance ; and that, in striking such balance, the allowances to Mr. Wauchope for commission, trouble, and correspondence, as cashier and agent under the trust, and for the tutors and curators, and for Lord and Lady Montgomerie, are to be placed to his credit : that upon the said annual balance, Mr. Wauchope is chargeable with interest, at the rate of five per cent., after allowance of a year for stocking out the same, so far as consists of rents payable in victual ; and of six months, so far as consists of rents payable in money ; and of the like period of six months, so far as consisting of other payments of money : that Mr. Wauchope is not chargeable with interest on his receipts *de die in diem*, or until the expiration of the said periods :

‘ repel the objections to the allowance proposed by  
‘ Messrs. Keith and Wilson (the accountants) for  
‘ Mr. Wauchope, as agent and cashier aforesaid; as  
‘ also to the proposed allowance to Messrs. Keith and  
‘ Wilson for auditing the accounts; and, farther, re-  
‘ pel the objection to the charge for the expence of  
‘ the adjudications in implement.’ Both parties hav-  
ing reclaimed, the Court (2d February 1813) refus-  
ed the petition for Lady Montgomerie; but altered  
the interlocutor, and approved of the accountant’s  
reports produced by Wauchope, and as prayed for by  
him. On the 8th of April 1816, the House of Lords,  
on the appeal of Lady Montgomerie, reversed this  
last interlocutor; and remitted the case, with instruc-  
tions to review the other interlocutors, so far as com-  
plained of, and to take the opinion of the Judges of  
the Second Division. Under this remit, the opinion  
of all the other Judges was asked on these points.—

‘ 1. Is it consistent with the law of Scotland, when  
‘ a person names his law-agent and cashier to be one  
‘ of several tutors and curators to his children, and  
‘ trustees for the management of his estates, that the  
‘ rest of the tutors, curators, and trustees should ap-  
‘ point the said law-agent to be also law-agent and  
‘ cashier to them?

‘ 2. If so appointed, and so acting, is the law-agent  
‘ and cashier, in respect that he is also a tutor and  
‘ trustee, bound to account in a different manner, and  
‘ on different principles, from what would have been  
‘ competent to a stranger agent and cashier?

‘ 3. Is the mode of accounting ordered by the in-  
‘ terlocutor of the First Division, of 2d July 1812, as  
‘ between Lord and Lady Montgomerie and Mr.  
‘ Wauchope, agreeable to the law of Scotland?

The Court found accordingly; and remitted to the Lord Ordinary to adjust the balance due by Mr. Wauchope.

*Pursuers Authorities.*—(Liability for Profits).—1. Stair, vi, § 17 & 21; 1. Ersk. vii, 19; Wilsons, June 26, 1789, (16376.); Mercer, May 28, 1814, (F. C.); Pr. of Eq. 375.—(Annual Balance).—Wilson, July 10, 1688, (505).—(Rate of Interest).—1. Stair, vi, 19; 1. Stair, xv, 8; Dirleton, *vece Pecunia Prep.*; 1. Voet, xxvi, 7, 9; 3. Huber, 283.—(Tutor acting as Agent).—Scott, Feb. 19, 1736, (13433); Lord M'Donald, Nov. 13, 1780, (13437).—(Adjudication).—2. Ersk. xii, 50.

*Defender's Authorities.*—(Annual Balance).—Campbell, March 3, 1802, (No. 4, Ap., An. Rent); Spalding, May 19, 1809, (F. C.); Hamilton, Feb. 25, 1813, (F. C.); Lord Elphinstone, May 15, 1790, (4067); Duke of Roxburgh, Feb. 25, 1819, (Not rep.); 2. Bell, 393.

RUSSELL, ANDERSON, & TOD, W. S.—J. WAUCHOPE, W. S.—  
Agents.

No. 510. Mrs. C. NEILSON and HUSBAND.—*Clerk—M'Farlane.*  
and  
G. A. BAILLIE and Others.—*Cranstoun—G. Bell.*  
Competing.

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S.

*Implied Condition si sine liberis—Clause.*—In 1800, Gilbert Neilson, who had two daughters, Jane and Cecilia, executed a trust-deed, for the purpose of paying certain legacies; and as to 'the whole rest and  
' residue of my heritable and moveable means and  
' estate, I appoint and ordain my said trustees, &c.  
' to divide and pay over equally, share and share  
' alike, to Jane Neilson and Cecilia Neilson, my own  
' two daughters, or survivor of them, regard being  
' always had to the sum liferented by my wife, the  
' piece of ground and dwelling-house built thereon,  
' and my household-furniture, also liferented by her,

‘ which are not to be divided betwixt my two daughters, or survivor of them, and foresaids, until after her decease.’ At the date of this deed, Jane was married to W. Baillie, and had two children, and thereafter she had another child. In November 1806, she died, and was survived till July 1807 by her father. On his death, the whole residue was claimed by Cecilia. This was resisted by the children of Jane, who contended that they had right to their mother’s share, under the implied condition *si sine liberis*. In a multiplepounding brought by the trustees, the Lord Ordinary preferred the children for their mother’s share ; and the Court, after advising a petition and answers, and a hearing in presence, adhered.

*Neilson’s Authorities*.—Yule, Dec. 20, 1758, (6400); 3. Ersk. viii, 40 & 46; 3. Ersk. ix, 9; Oliphant, June 19, 1793, (6603); Brown, June 2, 1792, (14863); Wishart, June 16, 1763, (2310); Fleming, June 6, 1798, (8111); M’Kensle, Feb. 2, 1781, (6602); Wallace, Jan. 28, 1807, (App. No. 6, Clause.)

*Baillie’s Authorities*.—Magistrates of Montrose, Nov. 21, 1738, (6398); Walker, Dec. 1744, (Elch. No. 5, Imp. Will); Bining, Jan. 21, 1787, (13047); Wood, June 26, 1789, (13043); Pr. of Eq. 180; Ronghead, Feb. 14, 1794, (6403); 6. Pothier, 556.

TOD & WRIGHT, W. S.—J. ROBERTSON, W. S.—Agents.

**POLLOX’S TRUSTEES, Pursuers.**—*Cranstoun—Green-shields—Moncreiff—Cockburn.*

**COMMERCIAL BANKING COMPANY, Defenders.**—*Clerk—Jeffrey—More.*

No. 511.

*Factor—Master and Servant.*—On the establishment of the Commercial Banking Company, the late J. Pollok, who was then engaged in business as a writer to the

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Lord Pitmilley.  
M’K.

signet; was elected to the office of manager of the bank, with the promise of 'a liberal salary, to induce him to leave off his professional pursuits.' His salary was fixed at £1,000 a-year, from the 3d of December 1810, when he entered on the administration of the office. By the contract of the company, the manager was declared to be removeable by the vote of two-thirds of the ordinary committee of management. Pollok having been dismissed on the 9th of July 1812, he raised an action, (which, on his death; was pursued by his trustees), on the allegation that, in the peculiar circumstances under which he was appointed; he had right to the office during the joint endurance of his life and of the current contract of the Company, and that the attempt to remove him had been made in a manner injurious to his feelings, reputation, and interest; and he concluded,—1. That he had right to the office and emoluments of manager for the above period, 'or until he shall be lawfully removed by the said copartnery from his said office ob culpam, or for malversation in office;' and, 2. For solatium and damages. In defence, the Bank maintained,—1. That he was removeable at pleasure; and, 2. That he had resigned, or, at least, had afforded sufficient reason for dismissal. The Lord Ordinary found, that, 1. His dismissal cannot 'be objected to by the pursuer, upon the ground of want of power in the defenders to dismiss or remove the manager of the banking establishment;' but, 2. 'That the defenders having removed and dismissed the pursuer from his office against his consent, must, in the circumstances under which his appointment took place, and considering his situation previous thereto, be held liable to indemnify

‘ him for the loss sustained by his dismissal from office, unless it can be proved by the defenders that the pursuer was guilty of malversation in office, or that he contumaciously refused obedience to warnings given him by the defenders or their committee, and to regulations for his future conduct in his official department, plainly laid down for him, or had become unfit, subsequent to his appointment, for the discharge of his duties ;’ and as they had not relevantly condescended to this effect, that they were liable in reparation. The Court recalled the second part of this interlocutor, and remitted to his Lordship to receive a new condescendence from the defenders, with a view to prepare issues. The case having been thereafter sent to the Jury Court, it was alleged by the defenders, that as it was finally decided that they had power to remove Pollok, they were not required to shew cause for so doing. To determine this point, the case was retransmitted ; and, on the report of the Lord Ordinary, the Court found, that although the defenders, under the subsisting contract, possess power and authority to remove the manager from his office, which he did not hold for life, yet, under the peculiar circumstances attending his appointment, they were not justified in the exercise of that power without reasonable cause ;’ and remitted to the Jury Court to receive a more special condescendence from the defenders, and to prepare and try issues.

R. COWAN, W. S.—INGLIS & WEIR, W. S.—Agents.



No. 512.

A. CUBIE, Pursuer.—*Cranstoun—Blackwell.*  
 W. POLLOCK, Defender.—*Moncreiff—Jardine.*

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SECOND DIVISION.  
 Lord Cringletie.  
 B.

*Road Statute—54. Geo. III, c.* —By the statute 54. Geo. III, c. relative to the road between Glasgow and Shotts, it is prohibited ‘to lay stones, broken or unbroken, gravel, or any other obstruction, upon the road sides,’ power being given to the trustees to provide proper places as repositories for the high-road materials. Under this statute, Cubie prayed an interdict from the Sheriff against Pollock, surveyor on the road, from laying down stones and mud opposite to his premises. This was refused, in respect of the 56. Geo. III, called the Carlisle Act, which the Sheriff held to supersede the 54. Geo. III. But, in an advocacy, the Lord Ordinary altered this judgment, found that the 56. Geo. III was not applicable to the road in question, and granted the interdict, in respect of the provision of the act 54. Geo. III; and the Court adhered.

J. HAY, W. S.—HILL & HOPKIRK, W. S.—Agents.

No. 513.

J. NEILSON, Pursuer.—*Cranstoun—M’Niell—Marshall.*

W. NEILSON, Defender.—*More.*

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 H.

In this case no general point was decided. It was an action of count and reckoning by the pursuer, as executor of a pupil, against the defender, as tutor, on the ground of liability for omissions. In this the pursuer failed; and the Lord Ordinary, after two remits to accountants, assoilzied the defender. Hav-

ing reclaimed, the Court allowed him to condescend specifically as to his objections to judicial inventories made up by the defender, on payment of the previous expences; but he failed to do so; and the Court adhered.

CAMPBELL & CLASON, W. S.—A. NAIRNE,—Agents.

MAGISTRATES of EDINBURGH, Petitioners.—*L'Amy*.  
Mrs. JEFFREY and Others, Respondents.—

No. 514.

*Process.*—The Court, in an action at the instance of the respondents against the petitioners, remitted to the Lord Ordinary, after avizandum had been made by him to the Inner House, to assoilzie the petitioners, in respect the action had been deserted.

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D.

M'RITCHIE & MURRAY, W. S.—J. M'ANDREW,—Agents.

A. DINGWALL, Pursuer.—*Jardine*.  
T. M'COMBIE and Others, Defenders.—*Bell—Monteath*.

No. 515.

*Latent Trust*—*Statute 1696, c. 25.*—By a regulation of the Leith Clyde and Tay Fishing Company, it is declared, that when a partner sells his share, the company shall have the option either to permit the transfer or to buy the share. Dingwall, in 1810, purchased two shares; but the company having refused to admit him as a partner for more than one, he conveyed the other to Thomson, who was entered in the company books as a partner. In January 1816, Thomson was rendered bankrupt, and executed a conveyance in trust to M'Combie and others, for pay-

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D.

ment of his debts. Within sixty days of his bankruptcy, he granted an assignation of the share to Dingwall, on the narrative that he held it in trust for him. The company refused to receive Dingwall, and, in exercise of their power, bought the share from Thomson's trustees. Decree of reduction of the assignation, on the act 1696, c. 5, having been obtained by the trustees, Dingwall brought a declarator both against them and the Shipping Company, to have it found that the share belonged to him, and that they were bound either to transfer the share, or to account to him for the price. In defence it was pleaded,—1. That there was no evidence of the trust; and that, by 1696; c. 25, the trust could only be proved by a back-bond or oath. 2. That granting there was a trust, Dingwall had been guilty of a fraud upon the Shipping Company, of which he could not avail himself; and, 3. That being a latent trust, it could not affect the creditors of Thomson.

In answer to the first defence, Dingwall maintained, that the trust was proved by the real circumstances of the case; and that although the assignation was reduced, he was entitled to found on the narrative as written proof of the trust. The Lord Ordinary, in respect ' that Dingwall held ' the share in the Shipping Company concern in the ' name of Thomson, who never drew any part of the ' proceeds thereof himself, but that Dingwall drew ' the whole proceeds and emoluments, and applied ' the same for his own behoof: that Thomson, in ' December 1815, assigned and conveyed the share ' which stood in his name to Dingwall; and which, ' in consequence of the trust, by which alone this subject stood in his name, he was bound to do: that

‘ the creditors of Thomson cannot stand in a better situation than he did; and that the act 1696 does not apply to the circumstances of this case, so far as Thomson’s creditors are concerned,’—found, that Dingwall is entitled to draw the whole price arising from the sale of this share.’ To this interlocutor the Court adhered.

*Pursuer’s Authorities.*—(1.)—Ramsay, July 30, 1748, (12757); Anderson, Jan. 25, 1804; Executors of Montgomery, Feb. 7, 1811, (F. C.); 1. Stair, x, 16; 4. Stair, xi, 21; 4. Bankt. xiv, 34 & 102; 3. Ersk. v, 10; Gilchrist, July 4, 1809.

*Defenders’ Authorities.*—(3.)—Sommerville, May 26, 1813, 1. Dow, 50; M’Knight v. Bertram, Jan. 1797, (1. Bell, 216, note 1).

J. MORRISON, W. S.—J. LYON,—Agents.

J. MACKIE, Pursuer.—*Cranstoun—Blackwell.*  
W. MACKINNEL, (Trustee for HANNAY’S CREDITORS),  
Defender.—*Bell—Hunter.*

No. 516

*Bankrupt—Personal Exception—Title to Pursue.*  
—Mackie, as agent of the Paisley Bank [at Stranraer, discounted a bill for £73 : 15s. to Hannay on the 15th May 1815. This bill was dishonoured; and Hannay having thereafter (10th July) presented a bill for £82 : 10s. for discount, he allowed it to be retained in security of the other. On the 7th of August, Hannay executed a trust-deed in favour of Mackinnel for behoof of his creditors, and on the 12th he was rendered bankrupt. To this deed all the creditors, with the exception of Mackie, acceded. An action was then raised by Mackinnel, as trustee, against Mackie, for payment of the bill for £82 : 10s., and also against one Moreland, (who was accountant in the bank), for payment of a dividend of £110 : 15 : 8,

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F.

due to Hannay from an estate on which Moreland was trustee. They gave in joint defences, signed by themselves, which were entitled, 'to the action at the instance of William Mackinnel, *trustee for the creditors of Patrick Hannay in Caldons*;' and pleaded, that they had 'a well-founded lien on the funds pursued for, for security and payment of this dishonoured bill, (the one for £73 : 15s.); and the defenders have repeatedly offered to arrange and pay accordingly;' but they asked to see Mackinnel's title, with which they must be satisfied before any final arrangement can take place.' The trust-deed was produced on the 12th December 1815, to which no objection was made; and the inferior court, on the 9th July 1816, found that Mackie had a lien over the bill for £82 : 10s., and Moreland over the debt of £110 : 15 : 8, till the bill for £73 : 15s. was paid. Under this judgment, the balance, together with the bill for £82 : 10s., were (4th December 1816) consigned, to be given to Mackinnel, without any objection to his title. But, in an advocacy, the Lord Ordinary found (12th February 1817) that there was no right of retention over the £110 : 15 : 8; decerned against Moreland; and, quoad Mackie, sisted procedure till a reduction was brought of the trust-deed. In consequence of this, Mackie arrested the £110 : 15s. 8d. in Moreland's hands; and, that his diligence might be effectual, he raised a summons of reduction of the trust-deed, on the act 1696, c. 5, and also concluded against Mackinnel for a count and reckoning, which part of the libel, however, was afterwards passed from.

In defence, Mackinnel pleaded, that as Mackie was a creditor for the bill of £73 : 15s., he was barred, by accession, or personali exceptione, from pursuing this

action, seeing that he had recognized him as trustee during the whole course of the action in the inferior court and in the advocacy, and that thereby he had misled and injured the creditors. It was answered, that Mackie, in the litigation, pleaded as a *debtor*, and not as a *creditor* : that he bona fide believed himself to be so, and was supported in this idea by the inferior court, in virtue of whose decree he consigned the sum which he conceived to be owing by him. The Lord Ordinary decerned in the reduction ; and the Court, after altering this judgment, returned to it ; but found that it decided nothing ‘ as to the effect of ‘ any diligence that may have been used.’

The Court were much divided on this case. The majority of their Lordships held, that Mackie bona fide believed that he was a debtor to the estate, which induced him not to object to the trust-deed ; while the minority were of opinion, that as he was truly a creditor, he was bound to know this ; and that, as such, his conduct was sufficient to bar his title to pursue.

*Defender's Authorities*.—Fullarton, Nov. 19, 1714, (7501) ; Ormiston, Jan. 3, 1750, (13955) ; 2. Bell, 429–592 ; M'Vicar, Feb. 18, 1762, (1214) ; Croll, May 7, 1791, (12404).

DONALDSON & RAMSAY, W. S.—HUNTER & CAMPBELL, W. S.—  
Agents.

No. 517. NEILSON and URE, Pursuers.—*Moncreiff—Skene*.  
A. WATHERSTON, Defender.—*Jameson*.

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Lord Cringletie.

B.

*Principal and Agent*.—The pursuers, who had been in partnership with Watherston, as West India merchants, dissolved the company in 1819, and sold their property at Trinidad to Watherston for a certain price, but bound themselves to pay up all the expences of the establishment there till a particular date, as they should be ascertained by their agent. The property was, accordingly, made over to Watherston, who settled with one Wright, as the pursuers attorney. In an action of count and reckoning, raised by them against Watherston, they alleged that Wright had no power to settle in the mode he had adopted; and that Watherston knew that his charges were extravagant. But the Lord Ordinary being satisfied that Wright was their attorney, and had 'the right to ascertain the said expences, and to retain the property in his hands for payment of them,' found, that the defender was 'not liable for these expences, being extravagant,' and, therefore, assoilzied him. The Court adhered.

A. PEARSON, W. S.—CAMPBELL & CLASON, W. S.—Agents.

No. 518. S. and A. LEITH, Suspenders.—*Buchanan*.  
F. LEITH, Charger.—*Cranstoun—Robertson—Menxies*.

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Lord Meadowbank.

D.

*Process—Decree in foro, or in absence*.—John Leith, as executor-dative of his father, Captain Leith, pursued an action against Morrison, who was assoilzied, with expences. Being unable to recover pay-

ment from John, an action was raised by Morrison against Stuart and Annabella Leith, children of Captain Leith, on the allegation that they were interested in the process, and also against Francis Leith, on a special ground. During the dependence of the action against Morrison, both Stuart and Annabella Leith were minors, were not parties to it, and did not represent their father. He obtained decree in absence against them, and in foro against Francis Leith. The latter having paid the debt, received an assignation to the decree in absence, on which he instituted an action of relief against Stuart and Annabella. The former was out of the kingdom, and decree in absence was pronounced against him; but appearance was made for Annabella, whom the Lord Ordinary assoilzied. A representation having been lodged, she was ordered to answer it, but failed to do so; and decree was thereupon pronounced against her. On these decrees a charge was given by Francis, of which they brought a suspension; against the competency of which it was objected, that the decree against Annabella was in foro, and that Stuart could be heard only on paying the expences and finding caution judicatum solvi. The Lord Ordinary repelled the objection, in respect that it was not denied that the cause of Annabella 'abandoning her defence arose from the indigent circumstances to which she was reduced, and her utter inability to prosecute her claims in a court of justice:' that the said decree passed in absence, and sine causa cognita, and cannot be held to afford a sufficient plea in bar of the present proceedings; and, on the merits, suspended the letters simpliciter; and the Court adhered,



*Suspender's Authorities.*—*Millie*, Nov. 27, 1801, (12176); *Petrie v. Hardie*, Nov. 1817, (Not rep.)

*Charger's Authorities.*—A. S. Feb. 1810; 4. *Ersk.* iii, 6; 4. *Bankt.* xxxvi, 13; 4. *Stair*, xli, 22; *Stratton*, June 26, 1681, (12229); *Kinloch*, Dec. 27, 1692, (12233); *Strachan*, Dec. 6, 1727, (12239); *Young*, Feb. 10, 1803, (12178); *Hamilton*, Nov. 25, 1813, (F. C.)

W. DUTHIE, W. S.—J. R. STODDART, W. S.—Agents.

No. 519.

A. BLAIR, Advocate.—*T. H. Miller*.

W. ROBSON, Respondent,—*Moncreiff*.

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Lord Meadowbank.

H.

*Process.*—Blair, as factor for the trustees of Miller of Dalswinton, raised a summary process of sequestration against Robson, a tenant on the estate, for payment of arrears of rent. The latter consigned the money, but pleaded compensation on a bill granted by Miller. In answer to this plea, Blair alleged,—1. That the bill was prescribed; and, 2. That not being a liquid claim, it was not competent to enter into any question relative to it in this process. The Sheriff being satisfied that Blair had agreed to wave the point of form, provided it could be shewn that the bill was resting owing, ordered him to produce extracts from Miller's books. Against this judgment he (with the leave of the Sheriff) presented a bill of advocacy; but the Lord Ordinary and the Court refused it, and remitted the case simpliciter.

A. BLAIR, W. S.—WELSH & EWART, W. S.—Agents.

J. MAXWELL and Others, Pursuers.—*Moncreiff—* No. 520.  
*Maitland.*

J. GRACIE, Defender.—*Clerk—Jameson.*

*Clause—Fiar or Liferenter.*—Agnes, Grizel, and Ann Irving, (who was married to one Blair), succeeded to their father in certain heritable subjects. In 1771, Grizel disposed her third share, mortis causa, 'failing heirs of my own body, from me and all others my heirs and successors, to and in favour of the said Agnes Irving, and the heirs lawfully to be procreated of her body, or her assignees, in fee and liferent; and to *Ann Irving*, my youngest sister-german, &c. and the heirs lawfully to be procreated of her body, or her assignees, as particularly to be herein after stated, also in fee and liferent; and Elizabeth Irving, &c. in liferent; and failing heirs of the bodies of the said Agnes and Ann Irvings, or their assignees, and after expiry of the liferents, as hereby provided, I hereby dispo, &c. to and in favour of Robert Maxwell and Edward Maxwell, my cousins by the father's side, and to John Fraser of Laggan, my cousin by the mother's side, equally between them three, and their heirs or assignees, in fee.' The procuratory of resignation and the precept of sasine contained the same destination; and power was given to Agnes to sell one-half of the third share, and to alter the destination to the Maxwells and Fraser; but it was declared, that the said Ann Irving's being provided to the liferent and fee of the premises, in manner above mentioned, shall not entitle her to sell or convey away any part thereof, without the consent of the said

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 Lord Alloway.  
 S.

‘ Agnes Irving.’ Grizel having died unmarried, Agnes, in 1775, disposed, *mortis causa*, her own proper share, and that part conveyed to her by Grizel’s disposition, ‘ failing heirs of my own body, to and in favour of the said *Ann Irving*, in liferent, and the heirs of her body, in fee; and after her death, failing heirs of her own body, to and in favour of the said *Elizabeth Irving*, in liferent, in case she shall survive the said *Ann Irving*, and to the said *Robert Maxwell*, *Edward Maxwell*, and *John Fraser*, equally amongst them three, and their heirs, successors, or disponees whatsoever, in fee.’ In 1776, Agnes executed a new deed, with the view ‘ to prevent the said *Edward Maxwell*’s creditors from attaching the share of my estate designated for him;’ whereby she revoked ‘ all former settlements whatsoever made by me in favour of the said *E. Maxwell*, except in the event and for the purpose after mentioned; and hereby, for the love, &c. I bear to his children, give, grant, and dispo-  
 ‘ &c., failing heirs of my own body, and from all others whatsoever, after the decease of the said *Ann*  
 ‘ and *Elizabeth Irvings* without heirs of their body, to and in favour of *Bryce*, *Isobel*, *Marion*, and  
 ‘ *Charlotte Maxwells*, all lawful children of the said *E. Maxwell*, &c., heritably and irredeemably, all and  
 ‘ whole the share and portion disposed by me to the said *E. Maxwell*, and to which he would have succeeded.’ Agnes died a few days thereafter, without making up titles under Grizel’s disposition; and *Ann* obtained herself served heir of provision to her two sisters, and was infeft as unlimited fiar. She then disposed the whole subjects *mortis causa* to *Mrs. Gracie*, who, on her death, was infeft in them. The

children of E. Maxwell brought a reduction of Gracie's titles, on the ground that *Ann Irving* was merely liferentrix, and that they were fiars. But the Lord Ordinary assoilzied her, in respect 'that, by the terms of the conveyance to Mrs. Blair, (Ann Irving), and her children nascituri, in fee, the fee of the subjects in question was in Mrs. Blair: that Mrs. Blair's right was not fettered by any prohibition against altering the order of succession; and that she had sufficient power to execute the deed under reduction;' and the Court adhered.

*Pursuers' Authorities.*—Newlands, July 9, 1794, (4289); M'Intosh, Jan. 28, 1812, (F. C.); Tinnoch, Nov. 26, 1817, (F. C.); Seaton, March 6, 1793, (4219).

*Defender's Authorities.*—Stewarts, July 8, 1789, (15535); Brown, May 25, 1808, (No. 10, App. Tailzie); Frog, Nov. 25, 1735, (4262); Lilly, Feb. 24, 1741, (4267); Lindsay, Dec. 9, 1807, (No. 1, App. Fiar); Campbell, Dec. 5, 1820, (Not rep.)

CORRIE & WELSH, W. S.—J. THORBURN,—Agents.

J. MAIR, Suspender.—*Forsyth.*

J. MILL, Charger.—*Moncreiff*—*Graham Bell.*

No. 521.

*Jurisdiction*—*Stat. 25. Geo. III, c. 51.*—Mill, as farmer of the post-horse duties of Scotland, laid an information before the Justices of the Peace, on the 25. Geo. III, c. 51, against Mair, for having omitted to insert in his weekly account with the stamp-office that he had let out to hire a horse and gig on a particular day, and concluded for a fine of £20. The Justices decerned for £10; and, on an appeal by Mair to the quarter-sessions, this decree was affirmed. He then brought a suspension, which was objected to as incompetent, in respect, 1. That this was a revenue

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question, in which the Court had no jurisdiction ; and, 2. That by the above statute it is declared, ' that ' if any party think himself aggrieved by the sentence ' of any Justice or Justices of the Peace, then he ' may appeal to the Justices of the Peace at the next ' general quarter-sessions for the county, who are ' hereby empowered to summon and examine witnesses upon oath, and finally to hear and determine ' the same ;' and that as no excess of power was alleged, the decree of the Justices was not subject to review. The Lord Ordinary dismissed the suspension, as incompetent, on the first objection ; but the Court adhered, ' in respect there is no allegation of ' an excess of powers on the part of the Justices of ' the Peace or quarter-sessions.'

*Suspender's Authorities*—Buchanan, March 10, 1754, (7347) ; Dawson, Feb. 18, 1800 ; Campbell against Mill, summer session 1820, (Not rep.)

*Charger's Authorities*.—Lord Prestongrange, Jan. 8, 1756, (7350) ; Countess of Loudon, May 28, 1793, (7396) ; Young, June 28, 1814, (F. C.)

D. FISHER—S. C. SOMERVILLE, W. S.—Agents.

No. 522. J. ANDERSON, Suspenders.—*Cranstoun—M<sup>r</sup> Farlane.*  
MRS. BROWNLEE, Charger.—*Moncreiff—More.*

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Lord Cringletie.  
M<sup>r</sup>K.

*Reparation*.—Brownlee employed Anderson and Ralston to deliver a quantity of wood to H. and R. Baird ; in the course of doing which, a shed belonging to the Bairds was driven down. For reparation of the damage thence arising, Bairds were found entitled, in an action against them, to retain part of the price. Brownlee then brought an action of relief against Anderson, on the allegation that the damage had been occasioned by the negligence of his servant.

Anderson's defence was, that he was employed by Ralston, and not by Brownlee, and that the claim lay against the former. But the inferior court, on a proof, found that he had contracted directly with Brownlee to deliver the wood, and decerned against him. And the Lord Ordinary and the Court, in a suspension, found the letters orderly proceeded.

TOD & WRIGHT, W. S.—J. JONES,—Agents.

J. THOMSON, Suspender.—*Cranstoun—Forsyth.*

J. BROWN, Charger.—*Jeffrey—More.*

No. 523.

*Landlord and Tenant.*—This case arose out of that reported at No. 503. Brown had let the upper or drawing-room flat of the house there mentioned to Thomson, as a gunsmith's shop, in reference to a plan, according to which there were to be separate entries to it and to Brown's shop, which was situated on the flat below. But, in consequence of the interdict at the instance of Robertson, it became impracticable for Brown to make the intended door to his shop; and he, therefore, proceeded to open one into the passage which led up to Thomson's. Against this, as being a violation of the bargain, and rendering the same entry common to the two shops, Thomson presented a bill of suspension and interdict. But the Lord Ordinary, considering that this was now the only just and expedient arrangement which could be made, refused the bill; and the Court adhered.

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Bill-Chamber.  
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D. FISHER—D. CLEGHORN, W. S.—Agents.

No. 524. W. C. LEARMONTH and Others, Petitioners.—*Moncreiff—Blackwell.*

COMMON AGENT in Ranking of Parkhall, Respondent.

—*Clerk—M'Niell.*

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*Ranking and Sale—Condition.*—In the ranking and sale of Parkhall, several lots were exposed to roup, under the condition, that, for certain annuities affecting the price, the purchaser of lot first should retain in his hands and grant security for a principal sum sufficient to pay them ; but if he should not wish to do so, ' then the said annuitants shall be ranked ' on the price of lot third ; and the purchaser of this ' lot shall be obliged to retain in his hands, at legal interest ; a sum equivalent to the annuities, &c., and ' to grant sufficient security, &c. for the due payment to them respectively of the said annuities.' The two first lots were bought by John Learmonth, the uncle of the minor, who, after granting his bond for the price, consigned the amount, and was exonerated. The third lot was bought by his brother, W. C. Learmonth, who executed a bond of caution for the price ; but there was no obligation in it similar to that in the articles of roup. Having consigned the price, he and his cautioner presented a petition, praying for a warrant to get up the bond, which was opposed by the common agent, on the ground, that he was bound to find security for payment of the annuities. To this it was answered, that there was no obligation to that effect in the bond, the sole condition of it being consignment of the price. The Court refused the petition, and afterwards adhered.

A. PEARSON, W. S.—A. DOUGLAS, W. S.—Agents.

R. TURNER and SON, Complainers.—*Rutherford*.  
 W. WILSON and Others, Respondents.—*Blackwell*—  
*A. Wood*.

No. 525.

*Bankrupt*.—At a meeting of the creditors of Dunn, a bankrupt under sequestration, it was resolved by one party, whose votes amounted in value to £887 8s. 10d., against votes to the extent of £748 : 11 : 11, to send the bankrupt to Jamaica, to recover part of his estate situated there. Of this resolution, Turner and Son, creditors, who had not attended the meeting, complained, on the allegation, chiefly, that Dunn laboured under strong suspicions of fraudulent bankruptcy. The Court found, that ‘ the resolutions ‘ complained of were irregular and illegal ; and declare the same void and null.’

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MACMILLAN & GRANT, W. S.—T. DARLING,—Agents.

MONKLAND CANAL COMPANY, Petitioners.—*Jardine*.  
 W. DIXON, Respondent.—*Forsyth*.

No. 526.

Decree for execution, pending appeal, for the expences incurred in the action noticed at No. 176.

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W. PATRICK, W. S.—D. FISHER,—Agents.

J. SHARP, Suspender.—*More*.  
 W. NAPIER, Charger.—*Moncreiff*—*J. Tait*.

No. 527.

*Tack*.—Sharp presented a bill of suspension of a charge on a decree of removing, at the instance of Napier, alleging, that while Napier was abroad, his

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M'K.

x k



factor had agreed to grant him a lease of a farm for seventeen years from Whitsunday 1819: that a missive to that effect had been signed by Sharp: that he had obtained possession under it; and, in reference to it, had addressed to the factor a letter, which he had delivered to Napier's law-agent, in which he said,—  
 ' That although I have this day entered into an agreement with you for a lease of the lands and others of Kilmahew for seventeen years from the time, and on the terms therein mentioned, yet I bind and oblige myself, &c. to remove from and relinquish unto you the said lands and subjects, without any regular process or warning other than six months previous notice in writing, and receiving payment or deduction of one year's rent.' On the other hand, Napier alleged that his factor had no power to grant a lease beyond one year: that, under a tack of this endurance, the suspender had got possession: that no tack or writing had ever been agreed to or signed by him or his factor for seventeen years: that the person to whom the above letter had been delivered was the suspender's own agent; that, at all events, he was more than a year's rent in arrear; and that he had got the warning stipulated. The Lord Ordinary refused the bill; and the Court adhered, reserving to the suspender ' all claims competent to him under his letter.'

*Suspender's Authority*.—Countess of Moray, July 23, 1772, (4392); Grieve, June 15, 1797, (5951); M'Pherson, May 12, 1815, (F. C.)

J. STUART—J. NEWTON, W. S.—Agents.

G. SWAYNE, Petitioner.—*Bell—Greenshields.*  
FIFE BANKING COMPANY, Respondents.—*More—*  
*Graham Bell.*

No. 528.

*Arrestment—Service and Confirmation.*—James Swayne, agent for the Fife Banking Company, died, leaving an infant daughter. His brother, George Swayne, was served tutor-at-law, and obtained himself confirmed, for her behoof, as executor. The Fife Bank then raised an action of constitution of a debt, alleged to be due by the deceased, against George, as executor, and on the dependence arrested the executry funds. Of these arrestments George applied to the Court for recal, maintaining, that it was incompetent for a creditor of the deceased to arrest the funds after confirmation. But the Court (by a majority) refused the petition, and found expences due.

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*Petitioner's Authority.*—Sime against Russel, Bell's Cases, p. 156.

*Respondents Authorities.*—2. Bell, 769; Atkinson, &c. Jan. 14, 1808, (No. 3, App., Service and Confirmation); Laing, July 8, 1741, (Richies, No. 9, Service and Confirmation).

WALKER, RICHARDSON, & MELVILLE, W. S.—S. C. SOMMERVILLE,  
W. S.—Agents.

BANK of SCOTLAND, Petitioners.—*Walker.*  
A. THOMSON and Others, Respondents.—*A. Mur-*  
*ray—J. Henderson, junior.*

No. 529.

*Interim Execution.*—The case, No. 319, having been appealed, the Court, in the circumstances, allowed interim execution for payment of one-half of

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the debt in common form, and ordained caution to be found for the other.

H. DAVIDSON, W. S.—THOMSON & FERGUSON, W. S.—Agents.

**No. 530.** J. GEDDES, Petitioner.—*Jeffrey—D. M'Farlane.*  
D. BARRY, Respondent.—*Sandford.*

June 11, 1822. *Title to Pursue.*—Barry, after having been sequestrated, was discharged on a composition, for which Geddes was cautioner, to whom he conveyed his estates in security. For payment of this composition Barry was imprisoned, and liberated on a decree of cessio. He then raised an action of accounting against Geddes, who objected to his title to pursue, in respect of the disposition omnium bonorum. The Lord Ordinary sustained the objection; but, before this interlocutor was final, Barry executed inhibition and arrestment on the dependence against Geddes. The latter having applied to have them recalled, the Court granted the prayer, on the ground that Barry had no title to pursue.

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W. DRYSDALE, W. S.—J. M'ALLAN, W. S.—Agents.

**No. 531.** W. DIXON, Petitioner.—*Clerk—Forsyth.*  
EDINGTON and SONS, and W. CARRICK, their Trustee, Respondents.—*Bell—Blackwell.*

June 12, 1822. *Title to Pursue—Personal Objection.*—After Edington and Sons had obtained decree of approval of a composition offered by them in a sequestration of their estates, Dixon, a creditor who had not ranked, presented a petition for recal of the decree, and raised

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a reduction of it. His title to pursue was objected to, because, at the date of the acceptance of the composition by the creditors, and of the decree, he was aware of the whole proceedings: that, by means of his partner, he had received from the bankrupts furnishings, in part payment of the composition; and had subsequently demanded, through his agent, payment of part of it in cash: that *res non erant integræ*, because, on the faith of the decree, the estate had been converted into money, and the greater part of the composition paid to the other creditors. The Court found that Dixon, 'by his conduct, is now barred ' *personali exceptione* from objecting to the said ' composition and procedure following thereon;' and, therefore, refused the petition, and assoilzied from the reduction.

*Petitioner's Authority.*—3 Ersk. iii, 48.

*Respondents Authority.*—3 Ersk. iii, 49.

D. FISHER—J. KERMAK, W. S.—Agents.

M. H. SCOTT, Complainer.—*Bell—Matheson.*

No. 532.

J. ROSS, (SCOTT and M'BEAN's Trustee).—*Skene—Robertson.*

*Bankrupt—Marriage-Contract—Expences.*—W. June 12, 1822.

Scott granted to his son, M. H. Scott, a short time before his marriage, this obligation.—' Edinburgh, 22d April 1814. As you intend, God willing, in a short time, to enter into the marriage state with your cousin, Miss Barbara Baillie, in order to enable you to support your wife and family, I hereby become bound to pay you £200 annually, in quarterly payments, during my life.' Scott's estate was

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sequestrated in 1816, and his son claimed to be ranked under the above letter, as an obligation which was onerous, in respect of the marriage. But the trustee refused to admit the claim, 1. Because the letter was holograph, and did not prove its own date. 2. That assuming the date to be established, the father was then insolvent; and, 3. Because, as the obligation did not form part of the marriage-contract, and was not in favour of the wife and children, it could not be held onerous. But, in a complaint, the Court, after the report of an accountant, altered 'the judgment of John Jameson, the late trustee, complained of, in respect of the onerosity of the obligation founded on: find that the petitioner is entitled to be ranked on the estate in question for the amount of the annuities due to the petitioner, as claimed by him;' but 'find no expences due to either party.' A question then arose, Whether the trustee would be entitled to charge his expences generally against the estate, and so to lay a part of them on that share to which Scott had right under the above judgment? The Court, in an explanatory interlocutor, declared, 'that the petitioner's dividend is not to be affected with any part of the expences incurred in this case.'

*Complainer's Authority.*—(3.)—Gourlay against Thomson, Winter Sess. 1820, (Not rep.)

*Respondent's Authorities.*—(2.)—2. Bell, 199; 3. Ersk. li, 22.—(3.)—2. Bell, 194; Hepburn, July 3, 1712, (190).

H. CANNAN, W. S.—M'QUEEN & M'INTOSH, W. S.—Agents.

EARL of WEMYSS, Pursuer.—*Thomson—Jeffrey—  
Mackenzie—Forbes.* No. 533.

DUKE of QUEENSBERRY's Executors.—*Cranston—  
Irving,  
and  
J. MURRAY, Defender.—Moncreiff—Cunninghame.*

*Tailzie—Tack.*—The Court had found, that the late Duke of Queensberry, as heir of entail in possession of the estate of Neidpath, had no power to let leases upon grassums, or with diminution of the rental, and reduced all those which had been so let.\* Among those which were brought under reduction by the Earl of Wemyss, the next heir of entail, was the lease of Flemington Mill. Prior to 1788, the Duke had let this farm, as a separate tenement, on a rent, with a grassum; in which year, he let it along with Whiteside and Fingland, for 57 years, to the defender, James Murray, of which two farms he was then in possession. By the new lease, it was stated, without any distinction, that the farms were let 'for the grassum and yearly rent and 'tack-duty after mentioned.' In consequence of a doubt whether the Duke could grant a lease for so long a period, under a clause in the entail, which permitted the heirs 'to set tacks or rentals of the said 'lands and estate during their own lifetimes or the 'lifetimes of the receivers thereof, the same being 'always set without evident diminution of the rental,' the Duke, in 1807, on Murray's renunciation, gave him a lease of Flemington Mill by itself, at a rent of £93 : 9 : 1, without any allusion to grassum, for 31 years; or, if this should be held to be too long, then

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\* See Earl of Wemyss, v. Murray, Nov. 17, 1815, Fac. Coll.

for 29, or 27, or 25, or 21 years, whichever of these periods should be sustained by the Court of Session or House of Lords. At the same time, the Duke made out new leases of the farms of Whiteside and Fingland to Murray's two sons, which were afterwards reduced, as having been let on grassums. With regard to that of Flemington Mill, two questions were raised,—1. Whether there was evidence that it had been granted for a grassum? and, 2. If not, whether it was competent to sustain it for any of the above periods? The Earl of Wemyss maintained, that the lease in 1788, for which a grassum had been paid, was identical with that in 1807, and which, consequently, was subject to reduction. Murray, on the other hand, referred to a correspondence between the Duke and his factor, relative to the lease in 1788, which he alleged proved that £93 : 9 : 1 was the full rent of that farm. The Court (after a remit from the House of Lords to review an interlocutor, 17th November 1815, assoilzieing the tenant, and sustaining the lease for 21 years from that date, and after a hearing in presence) held it competent to refer to the correspondence: found ' that the objection of grassum does not apply to the separate tenement of ' Flemington Mill; and, therefore, sustain the lease ' under reduction as valid and effectual, so far as regards Flemington Mill, for the restricted endurance ' of 21 years from the term of entry specified in the ' lease in question.'

*Defenders Authorities.*—(1.)—1. Craig, xiii, 18; M'Kenzie's Ob. on 1367, c. 10.—(2.)—10. Geo. III, c. 51; 2. Ersk. vi, 32; Earl of Wemyss, May 25, 1813, (P. C.); Price on Annuities, 363, 413; 2. Ersk. vi, 24; Redpath, Nov. 27, 1737, (15196); Gray, Dec. 11, 1765, (460); 3. Term Rep. 463.

RUSSELL, ANDERSON, & TOD, W. S.—W. LAWRIE—J. TWEEDIE,  
W. S.—Agents.

R. PENMAN and Others, Advocators.—*Cockburn*— No. 534.  
*Jameson.*

W. MARTIN and Others, Respondents.—*Greenshields*  
 —*J. Campbell.*

*Tack—Removing.*—Penman and others, as representing a friendly society, brought an action of removing, against Martin, from a house which they had let to him. His defence was, that it did not belong to the society, but to the St. John's Masonic Lodge. Compareance was made for certain persons, alleging themselves to be the officers of the Lodge, who produced a sasine, and contended that they alone had the power to remove. On the other hand, Penman, &c. founded on a minute, by which the property had been conveyed to them; on possession of the premises; and maintained, that as Martin had derived right from them, he could not object to their title. The Sheriff, in respect of the sasine, assoilzied Martin. But, in an advocacy, the Lord Ordinary held, that 'although there was no feudal title vested in this society, yet they had a beneficial and substantial right to these subjects: that Martin, who had derived his lease from them, could not dispute their right; and that the members of St. John's Lodge, who were not members of the friendly society, acknowledge that the friendly society was in possession of this right;' and remitted to the Sheriff to decern in the removing. To this interlocutor the Court adhered.

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*Advocators Authority.*—1. Ersk. vi, 51.

D. TURNBULL, W. S.—J. JOHNSTONE,—Agents.



No. 535.

J. MATHESON, Pursuer.—*Greenshields*.A. ANDERSON, Defender.—*Gordon—Moncreiff—  
Skene*.

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Lord Gillies.

D.

*Retention—Special Appropriation.*—Donald Frazer indorsed three bills, drawn in his favour by his brother John, to Anderson, as agent for the Bank of Scotland at Inverness, for the purpose of getting them accepted by the drawees in Glasgow. At this time both Donald and John were indebted to the bank in a greater sum than the amount of the bills; and John was now bankrupt. After two of the bills had been accepted, Anderson, on the allegation that the bills truly belonged to John, claimed retention of them in security of his debt, and, at least, of that due by Donald. The latter thereupon raised an action (which he assigned to Matheson) for restitution of the bills, or payment of their contents. The Lord Ordinary decerned against him for payment; and the Court adhered.

The Court held, that as the bills had been indorsed for the special purpose of negociation, the plea of retention could not be maintained.

*Defender's Authorities*—Creditors of Glendinning, July 8, 1746, (2573); Scot, June 13, 1809, (F. C.); 2. Bell, 124, Note.

J. PEDDIE, W. S.—M. ANDERSON—M'QUEEN & M'INTOSH,  
W. S.—Agents.

**Mrs. M'LEAN CLEPHANE, Suspender.—Cranstoun—** No. 536.  
*Keay.*

**Rev. D. M'ARTHUR, Charger,—Sir J. Connell.**

This was a question of fact, viz. Whether certain lands belonging to the suspender were church lands or not? On the assumption that they were so, the Presbytery of Mull had, under the act 1605, c. 6, designed to the charger a grass glebe out of them. But the Lord Ordinary and the Court, in a suspension, found that there was no legal evidence that they were church lands.

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SECOND DIVISION.

Lord Pitmilley.

F.

**A. CAMPBELL, W. S.—M'RTCHIE & MURRAY, W. S.—Agents.**

**DUKE of ROXBURGHE, Pursuer.—Mackenzie—H. J.** No. 537.  
*Robertson.*

**J. WAUCHOPE, Defender.—Fullerton.**

*Bona et Mala Fides.*—In 1648, an entail of the Roxburghe estate, including the lands of Wester Grange, was executed by Earl Robert. By virtue of certain reserved powers, Wester Grange was wadset in 1662 by Earl William; but was subsequently redeemed, and regularly incorporated in the entail by Duke John. The latter, in 1803, disposed his unentailed property, in trust, for various purposes, to Mr. Wauchope, and, along with it, conveyed, by mistake, the lands of Wester Grange. On the Duke's death, in 1804, a competition ensued for the estate of Roxburghe, which was sequestrated, and entrusted to a judicial factor. In 1814, Mr. Wauchope brought a multiplepoinding relative to the trust-funds in his

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hands. The pursuer having, by this time, succeeded in the competition, obtained (24th February 1815) a decree of reduction of the trust-deed, so far as regarded Wester Grange, and claimed, in the multipointing, the bygone rents. Mr. Wauchope opposed this, and pleaded,—1. That the rents had been levied in the bona fide belief that they belonged to the trust; and, 2. That they had been paid away in the due execution of it. In reference to this defence, the Lord Ordinary found, ‘ That the Duke having conveyed the lands of Wester Grange to his trustee, for the purposes mentioned in the trust, and the trustee having entered into the quiet possession of these lands, in virtue of the Duke’s conveyance, and uplifted the rents thereof, without the slightest challenge, until the present action was brought, the trustee was a bona fide possessor for the purposes of the trust; and he, accordingly, applied these rents, as he was bound to do, for the purposes of the trust : therefore, finds that the trustee is not accountable for the rents of these lands to the pursuer until the first interdictor was pronounced by the Lord Ordinary reducing his right : finds that the trustee is accountable to the pursuer for the rents from Whitsunday 1815, but for no prior rents uplifted by him.’ And his Lordship refused a representation farther, ‘ in respect of the decision of the Court with regard to the bona fide possession in the case of Crookedshaws, in the same entail of Roxburghe.’ To this judgment the Court adhered.

*Pursuer’s Authorities.*—2. Stair, i, 28; 2. Ersk. i, 25; Ogilvy against Ogilvy, 1810, (Not rep.)

MACKENZIE & INNES, W. S.—TOD & ROMANES, W. S.—Agent.

A. **BOYES** and Others, Suspenders,—*Moncreiff*— No. 538.  
*Hope.*

ANN HIGGINS, Charger.—*Cockburn*—*Blair.*

*Friendly Society.*—By a regulation of the Phoenix Benefit Society of Tailors of Edinburgh, it is declared, ‘that upon the death of a member or member’s wife, the nearest heir shall receive £8 sterling for defraying funeral charges;’ and, by another, ‘that if any member be carried before a magistrate, or other judge, accused of any dishonest practice, and the complaint be proven, he shall be excluded the society for ever, and forfeit all he has paid into the funds.’ J. Randall, a member, was convicted at the police-office of theft on 28th April 1819; and on his death, in 1820, his widow claimed the funeral money, which was refused, in respect of the conviction. In an action for it before the inferior court, she alleged that her husband was insane when he committed the offence; and that, therefore, the conviction was null. This being proved to the satisfaction of the inferior court, she obtained decree. A bill of suspension by the society was presented, on the ground, chiefly, that it was not competent to look beyond the conviction; and the Lord Ordinary passed the bill. But the Court remitted, with instructions to refuse it.

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 Bill-Chamber.  
 Lord Kinnedder.  
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*Suspenders Authority.*—*Craw*, Jan. 17, 1822, (No. 266).

*Charger’s Authorities.*—*Ker*, Dec. 17, 1793, (14078); 2. *Hume*, c. 13; *Martin*, Feb. 8, 1816, (F. C.)

T. WALKER—G. SIMSON,—Agents.

No. 539.

W. RODGER, Suspender.—*Moncreiff—Shaw*.  
CUNNINGHAM and SIMPSON, Chargers.—*Forsyth*.

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*Process—Statute 50. Geo. III, c. 112.*—In an action at the instance of Cunningham and Simpson against Rodger, the inferior court decreed against him for the principal sum, but no decree was given for expences. The process having been extracted, Rodger was charged to pay the principal sum. Having brought a suspension, the Lord Ordinary repelled the reasons, found expences due, and, in virtue of 50. Geo. III, c. 112; remitted to the inferior court to decern for the expences there incurred, if seen fit. This interlocutor became final, except as to the remit; against which Rodger reclaimed, on the grounds,—1. That as no expences were decreed for in the inferior court, and the process had been extracted, it was not competent to empower the inferior court to proceed farther in the case; and, 2. That the above statute only authorized a remit of the decree brought under suspension, and not of a matter which was not included in it. The Court at first adhered; but thereafter altered, and found ‘it incompetent to remit this case to the inferior court.’

*Suspender's Authorities.*—(1.)—Stair, 737; 2. Bankt. 675 & 681; Haldane, Aug. 4, 1761, (12187); Douglas, March 8, 1768, (8649); Town of Rothsay, Nov. 1789, (12188); Buchanan, Feb. 5, 1814, (F. C.)

J. GILLON—C. STEWART,—Agents.

L. KINLOCH and Others, Pursuers.—*Cockburn—Maitland.* No. 540.

C. M'INTOSH, Defender.—*Cranstoun—Buchanan.*

*Cautioner—Jurisdiction.*—The pursuers granted to Exchequer two bonds of caution for the faithful execution of the office of collector of taxes in a certain district by M'Intosh; and, among other obligations, that he should, at stated periods, ' in each and ' every year, so long as he shall execute the office of ' collector foresaid, pay over to the said Receiver- ' General all the rest and remainder of the monies ' arising from the said duties, and that ought to have ' been collected and rendered effectual by him, in ' virtue of the said acts.' The bonds contained no clause of relief nor of registration, but execution was to proceed on presentment of them to the Barons of Exchequer. A few years thereafter, the cautioners raised an action against M'Intosh, concluding,—1. To have it declared, that he was bound to relieve them; and, 2. That he should do so, either by cancelling the bonds, or in some other way. He pleaded in defence,—1. That the action was incompetent in the Court of Session, and that it ought to have been brought in Exchequer. 2. That posterior to the date of the bonds, he had found new caution for his future intromissions, by which the pursuers were so far relieved. 3. That although there were certain arrears still due, yet as there was no special clause of relief in the bonds; as he was not vergens ad inopiam; and as the pursuers had not been distressed, the action was premature. The Lord Ordinary sustained the jurisdiction, ' in respect that this action ' does not relate to the payment of any part of

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‘ the King’s revenue, but is merely an action brought  
 ‘ by cautioners for their relief of obligations which  
 ‘ they entered into many years ago for the defender.’  
 And, on the merits, his Lordship found, ‘ that as, by  
 ‘ the bonds of caution granted by the pursuers, as  
 ‘ sureties or cautioners for the defender, the obliga-  
 ‘ tions for performance of which the security was  
 ‘ granted, may be continuing and increasing every  
 ‘ day, and whatever arrears may be due upon the  
 ‘ first collections, for which the pursuers are liable as  
 ‘ cautioners, have been due for many years, the pur-  
 ‘ suers are entitled to insist, at common law, that  
 ‘ their obligation shall not any farther be extended,  
 ‘ and that they shall be relieved therefrom: there-  
 ‘ fore, finds, that the defender is bound to free and  
 ‘ relieve them of the whole obligations, &c. contain-  
 ‘ ed in the foresaid bonds, and all that is competent  
 ‘ or may be competent to follow thereon;’ and or-  
 dained the defender to shew that the arrears were  
 discharged, and how he proposed to relieve the pur-  
 suers of their future liability. The Court refused a  
 petition, without answers, as to the jurisdiction; and  
 thereafter, quoad ultra, adhered.

*Pursuers Authority.*—(3.)—S. Ersk. iii, 66.

*Defender’s Authority.*—(3.)—S. Ersk. iii, 65.

Æ. M’BEAN, W. S.—M’QUEEN & M’INTOSH, W. S.—Agents.

No. 541.

H. ROSE, Pursuer.—*Greenshields.*

D. M’LEOD, Defender.—*Matheson.*

June 13, 1822. *Expences.*—In this case the Lord Ordinary found

SECOND DIVISION. M’Leod entitled to expences. Against this interlocutor

Lord Pitmilley. Rose reclaimed, on the ground that M’Leod, by his

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conduct in the action, was not entitled to expences; but the Court adhered.

D. HORNE, W. S.—INGLIS & WEIR, W. S.—Agents.

J. BAILLIE and Others, Complainers.—*Moncreiff*— No. 542.  
*More—D. M'Farlane—J. Wilson, junior.*

J. WATSON, Respondent.—*Jeffrey—Cockburn—*  
*Maconochie.*

*Bankrupt—Agent in Sequestration.*—At the meeting June 13, 1822.  
 for the election of trustee on the sequestrated estates of Smellie, a competition arose relative to the appointment of law-agent. Baillie and his party voted for Sinclair, while Smith and others voted for Stewart. The election being disputed, the trustee named Mathie to act in the interim. Thereafter, Stewart having given up the contest; and the trustee having refused to employ Sinclair; Baillie and his friends presented a complaint to the Court, concluding that the trustee should be ordained to place the judicial and other proceedings in the sequestration under the care of Sinclair. But the Court dismissed the complaint, and found the complainers liable in expences.

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 F.

Their Lordships were of opinion, that, in general, the appointment of the law-agent ought to be left to the trustee, as it was highly inexpedient that it should be made the subject of competition.

J. PATISON, W. S.—G. NAPIER,—Agents.



No. 543. A. BAIRD and Others, Complainers.—*Jeffrey—Cockburn—Jameson.*

J. BAILLIE and Others, Respondents.—*Moncreiff—More—J. Wilson, junior.*

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*Bankrupt.*—This question related to the election of commissioners on the sequestrated estate mentioned in the preceding case. Baillie and his party voted for Dow and others, and Baird and his friends voted for Templeton and others. For the former the votes were in value £8,640 : 15 : 1, of which Baillie's alone was £8,190 : 10 : 6 ; and for the latter they were only £8,738 : 8 : 9. Both parties protested that their candidates were duly chosen. Against the election of Dow and others a complaint was presented by Baird and his adherents, on the ground that Baillie's claim was false and fabricated, except to the extent of about £300. The Court sustained the complaint,—found that Templeton and others had been legally chosen to be commissioners ; and ‘ in respect it is stated at the bar, that criminal proceedings have been instituted at the instance of his Majesty's Advocate, for his Majesty's interest, against the said John Baillie, founded on matters stated in this case, find it unnecessary to remit to his Lordship to take the same into his consideration.’

*Respondents Authorities.*—2. Bell, 405 ; M<sup>c</sup>Taggart, Feb. 1, 1809, (F. C.)

T. JOHNSTONE—J. PATISON, junior, W. S.—D. WILSON, W. S.—  
Agents.

J. PEDIE, Pursuer.—*Bell—Shaw.*

No. 544.

A. GRANT, Defender.—*Moncreiff—Matheson.*

*Jurisdiction—Forum Originis.*—Grant, a native of Scotland, but domiciled as a solicitor in London, *animo remanendi*, was edictally cited by Pedie, in an action before the Court of Session, to account for certain dividends payable out of the estate of F. Allwood, late merchant in Glasgow, on which Grant was trustee. He objected to the jurisdiction, on the ground that he was to be regarded as a foreigner. The Lord Ordinary at first sustained the jurisdiction simpliciter; and thereafter, in respect 'that the contract or obligation upon which the action proceeds 'took place in Scotland.' The Court, however, removed this qualification, and adhered 'to the interlocutor reclaimed against, in so far as the same 'sustains the jurisdiction *ratione originis*, and the 'forum thereby created.'

June 14, 1822.  
FIRST DIVISION.  
Lord Alloway.  
D.

It was agreed on the Bench, that this was no longer an open question.

*Pursuer's Authorities.*—Kames' Stat. Law Hist. Notes, No. 7; 5. Voet, i, 91; Dirleton, 280; 1. Ersk. ii, 19; Galbraith, Nov. 15, 1626, (4813); Balbirnie, Feb. 27, 1663, (ib.); Blantyre, Dec. 8, 1626, (ib.); Dyell, Feb. 8, 1632, (3714); Douglas, Feb. 1, 1642, (4816); Anderson, July 1747, (4779); Hogg, June 27, 1760, (4780 & 7674); Fairholme, Jan. 31, 1755, (2778); Pirie, March 8, 1796, (4594); Lindsay, Jan. 26, 1807, (No. 6, Ap. For. Comp.); McKenzie, March 8, 1810, (F. C.); Haig, May 26, 1812, (F. C.); 6. Bell on Deeds, 22, 23, 29; Styles of Jurid. Soc.; Hope's Min. Pt. 14; Off. of Mess.

*Defender's Authorities.*—2. Voet, i, 48; 1. Ersk. ii, 16 & 19; Hogg, June 7, 1791, (4619); Strother, July 1, 1803, (No. 4, Ap. For. Comp.); Bank of Scotland, Jan. 20, 1813, (F. C.); Brog, March 23, 1639, (4816); Anderson, July 1747, (4779); Fairholme, Jan. 31, 1755, (2778); Brunsdone, Feb. 9, 1789, (4784); French, June 13, 1800, (No. 1, Ap. For. Comp.); Wyche, June 27, 1801, (No. 2, ib.); Morecombe, June 27, 1801, (No. 3, ib.); Edmonstone, Forbes, and Levett, June 1, 1816, (F. C.)

J. PEDIE, W. S.—J. M'DONELL, W. S.—Agents.

L 12

*Received on account  
of J. Pedie & J. M'Donnell  
5 July 1822*

No. 545.

T. MITCHELL, Advocate.—*Bell—Tawse.*W. CUDDIE, Respondent.—*Alison.*

June 14, 1822.

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Bill-Chamber.

Lord Kinnedder.

M.K.

*Personal Objection—Diligence.*—Mitchell held an heritable bond for £300 over property belonging to Cuddie, and was, besides, a personal creditor. A composition-contract was entered into between Cuddie and his creditors; and, in a relative state, the heritable subjects were excluded, as not more than sufficient to meet the debt over them. To this contract Mitchell acceded; and thereafter obtained letters of horning on the personal obligation in the bond, under which he poinded some of Cuddie's effects. He then applied to the Sheriff for warrant of sale, who refused it, in respect that 'the poinder is barred by the agreement from attaching any other subjects belonging to the defender, for payment of the debt so secured, than that over which the security was held; and that it is inconsistent and incompatible with the agreement and contract of parties that the poinder, while holding a security for a debt, neither of which was taken into view, should accept of a composition on other debts, and yet, for payment of the debt heritably secured, attach these subjects which, at the time the composition was offered and accepted, were held out to him and the other creditors as the fund from which alone the composition could be paid.' Against this judgment Mitchell presented a bill of advocacy, on the grounds,—1. That the Sheriff had no power to stop the execution of diligence issuing from the signet; and, 2, That the contract did not bar him from executing diligence for payment of his heritable debt. The Lord Ordinary refused a

bill of advocacy, for the above reasons ; and the Court adhered.

It was observed, that the Sheriff was entitled to take notice of the personal objection before giving a warrant of sale.

*Advocator's Authorities.*—(1.)—54. Geo. III, c. 137, § 4.—(2.)—2. Bell, 503.

*Respondent's Authority.*—(1.)—1. Bell, 338, 339.

C. TAWSE, W. S.—CAMPBELL & ARNOTT, W. S.—Agents.

FORBES'S TRUSTEES, Pursuers.—*Cranstoun—Moncreiff—Buchanan.* No. 546.  
L. and W. M'INTOSH, Defenders.—*Clerk—Cockburn—Maitland.*

*Warrandice.*—Forbes of Culloden, after having granted two trust-deeds, conveyed, with consent of his former trustees, both his entailed and unentailed estates to the pursuers, in trust for his creditors, with absolute warrandice. The unentailed property was exposed by them to public sale in different lots, under condition, inter alia, that their title should be held unexceptionable ; that the price should be payable at Whitsunday 1818 ; and that thereupon ' the exposers, ' as trustees foresaid, shall be bound and obliged, as ' they hereby bind and oblige themselves, qua trustees foresaid, to purge the said lands of all encumbrances affecting the same before the term of Martinmas 1818, and to grant, subscribe, and deliver, ' as trustees foresaid, a formal and valid disposition ' of the foresaid lands, &c., containing procuratory of ' resignation, clause of absolute warrandice, &c., and ' all other usual and necessary clauses.' One of the lots included in the articles of roup not having been

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Lord Gillies.

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sold, L. M'Intosh, through W. M'Intosh, made a private offer for it, ' the price to be payable at Martinmas first 1818, when my entry will take place: ' the other conditions of sale to be in exact conformity with the articles of roup.' This offer was accepted of; but a dispute arose relative to the nature of the warrandice to be given, and the time of discharging the encumbrances. In an action for implement, raised by the trustees, they alleged,—1. That they were only bound to grant a disposition, containing a warrandice from their own fact and deed, and an assignation to the clause of absolute warrandice contained in the trust-disposition by Forbes to them; and, 2, That the agreement of the parties, when taken in connection with the articles of roup, was, that the price was to be paid at Martinmas 1818, while the encumbrances were not to be reported as discharged, nor the disposition executed, till the lapse of six months thereafter. On the other hand, it was maintained by the defenders,—1. That the trustees were bound to grant a disposition, either with absolute warrandice by themselves personally, or to warrant from their own fact and deed, and to bind their constituent in absolute warrandice; and, 2. That the price was not to be paid until the encumbrances were cleared off. The Lord Ordinary, after remitting to Mr. G. Russell, W. S. to examine the deeds, and to adjust the terms of the disposition, decerned in terms of his report, by which effect was given to the pleas of the trustees. But the Court found that the defenders ' are entitled to have a clause of warrandice ' inserted in the disposition, directly binding the ' truster, D. G. Forbes, Esq. of Culloden, his heirs ' and successors, in absolute warrandice, without re-

‘ference to former trusts, and the trustees in war-  
 ‘randice from fact and deed; and that the whole en-  
 ‘cumbrances affecting the lands must be cleared and  
 ‘paid off, and the disposition delivered simul et se-  
 ‘mel with the payment of the price;’ and afterwards  
 repelled certain special objections relative to the  
 amount of the encumbrances.

*Purvis's Authorities*.—1. Styles of Jurid. Soc. 95; 1. Bell's Styles, '167;  
 2. Stair, III, 46.

M'QUEEN & M'INTOSH, W. S.—Æ. M'BEAN, W. S.—Agents.

W. ROBERTSON, Petitioner.—*Fletcher*.

No. 547.

A. M'CALLUM, Respondent.—*Ivory*.

*Bankrupt*.—This was an application, under the June 15, 1822.  
 bankrupt-act, for sequestration of the estates of Mac-  
 Callum, which he resisted on various grounds; but  
 the petition was at last refused, of consent, in respect  
 of caution being found.

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 H.

M'MILLAN & GRANT, W. S.—W. DOUGLAS, W. S.—Agents.

J. MACKIE and P. M'OMISH, Suspenders.—*Gillies*.

No. 548.

R. H. HILLIARD and COMPANY, Chargers.—*Moncreiff*.

*Bill of Exchange*.—Hilliard and Company, as in- June 15, 1822.  
 dorsees of a bill drawn by M'Omish, and accepted by  
 Mackie, charged them to pay it. They suspended,  
 on the allegations,—1. That the chargers were not  
 onerous and bona fide holders; and, 2. That the  
 protest on which the diligence proceeded having been  
 taken at the instance of a bank with which the bill had  
 been discounted, and having been afterwards extended

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 Lord Pitmilley.  
 B.

in the name of the chargers, was irregular. After a reference to oath, the Lord Ordinary being satisfied as to the onerosity, repelled both grounds of suspension; and the Court adhered.

*Suspenders Authorities.*—(2.)—Chitty, 216; 1. Bell, 314; 2. Bell, 24.

J. GRAHAM, W. S.—D. GREIG, W. S.—Agents.

No. 549. A. CAMPBELL and his Curators, Pursuers and Suspenders.—*Clerk—M<sup>c</sup>Farlane.*  
D. TURNER, Defender and Charger.—*Greenshields—Jeffrey.*

June 15, 1822.  
SECOND DIVISION.  
Lord Pitmilley.  
M<sup>c</sup>K.

*Reference to Oath.*—After the case No. 308\* had become final, the suspenders referred to Turner's oath that he was not an onerous and bona fide holder of the bill for £150 to the extent of £120, (being the amount which was sustained by the Court), nor of the £30 bill. To this reference it was objected,—  
1. That it did not embrace the whole cause; and that, to make it competent, the suspenders must pass from the partial decree of suspension which they had obtained; and that they were bound to pay all the previous expences. The Court sustained the reference.

*Defender's Authorities.*—White, June 9, 1812, (F. C.); Dalziel, Feb. 4, 1792, (9407); Clark, Nov. 20, 1819, (F. C.)

TOD & WRIGHT, W. S.—J. GEMMEL,—Agents.

\* In the report of this case, at p. 267, line 14, for 'the £30 bill,' read 'the £150 bill, to the extent of £30.'



W. HUTCHISON, Petitioner.—*Alison*.

No. 550.

*Process*.—A warrant on the clerk of the Bill-Chamber to deliver up a bond of caution, which had been lodged in a process of advocacy, and which was said to be forged, was prayed for by a procurator-fiscal, in order to aid the investigation of the crime. The Court, in respect that he had acted as private agent in the inferior court for the party in whose favour it was executed, declined to grant the warrant, until the petition had been intimated to the Lord Advocate, and he had concurred in it.

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M'K.

TENNENT &amp; LYON, W. S.—Agents.

J. BALFOUR, (BLAIR'S TRUSTEE), Pursuer.—*J. Wilson, jun.*

No. 551.

W. MILLER and A. CAMPBELL, Defenders.—*Forsyth*.

*Bankrupt*.—Blair, who was debtor to the Royal Bank in six bills, and in a cash-credit, (for which Miller and Campbell were cautioners), indorsed, posterior to his bankruptcy, three bills for £713: 15: 11, in consideration of which, his own six bills were given up to him, a sum paid in cash, and an entry made to his credit in the cash-account. Of this indorsation the trustee on his sequestrated estate having raised an action of reduction on the act 1696, c. 5, the bank brought a process of multipoleinding, to have it found, that, in the event of decree of reduction, they were entitled to retain out of the proceeds of the indorsed bills, 1. The sum paid in cash. 2. A sum corresponding to that credited in the cash-ac-

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count, or, at least, to expunge that entry. 3. To restitution of the six bills delivered to the bankrupt; and, lastly, That they were liable to pay only the balance once and singly to those having best right. To this action, which was conjoined with the reduction, Miller and Campbell, the cautioners for the cash-credit, and the trustee, were made parties. The Lord Ordinary, in the reduction, found, that upon the trustee redelivering the six bills, he had right to the proceeds of the three indorsed bills, 'under deduction of any payments in cash made to Blair at the time, and reserving entire to the pursuer, (the trustee), and to the cautioners for Blair's cash-account, their respective claims to the sum placed to Blair's credit in said account, out of the bills so indorsed by him, to be discussed in the process of multiplepounding.' This interlocutor became final against the bank; but the cautioners represented, and maintained,—1. That they had a right to oppose the reduction of the bills, and that there ought to be a reservation to that effect; and, 2. That, at all events, as, by the decree of reduction, there was a fund still in the hands of the bank, they were entitled to insist that so much of it should be retained as might be sufficient to pay off the whole cash-account. The Lord Ordinary refused the representation, in respect 'that the interlocutor in the question with the bank has become final; and every question in which they are legally interested, as cautioners for the cash-account, will be open for discussion in the multiplepounding;' and the Court adhered.

*Defenders Authorities.*—(1.)—2, Bell, p. 235, 23, 29, 229, 166, 117, 124.

T. BAILLIE—J. BALFOUR, W. S.—Agents.

W. TASSIE and COMPANY, Pursuers and Suspenders.

No. 552.

—*Cranstoun—Cockburn—More.*

MAGISTRATES of GLASGOW, Defenders and Chargers.

—*Jardine.*

r

*River—Landlord and Tenant.*—The Magistrates of Glasgow are proprietors of four mills, situated on the Molendinar Burn, the source of which is the Hoganfield Loch. Of these mills, the Provan Mill is the nearest to the source; then the Town Mill; next the File Mill; and, lastly, the Subdean Mill; all of which have reservoirs except the File Mill. In 1809, the Magistrates advertised the Subdean Mill to be let; and stated, that 'it had a powerful fall, and commanded at all times an abundant supply of water.' Tassie and Company took a lease of this mill for 19 years from Whitsunday 1809. In 1811, the Magistrates let Provan Mill to James Miller, who bound himself to 'allow to remain open the sluices of the dams hereby set for at least three hours, whether he is grinding or not, for the service of the mills below the said Provan Mill, and that during any three hours in the course of the twenty-four which the Magistrates and Council for the time being shall think proper.' Tassie and Company, founding on the terms of the advertisement, and alleging that, by this clause, the Magistrates had deprived them of the regular use of the water, as thereby Miller was entitled to keep it up except for three hours in the twenty-four, suspended a charge for payment of their rent, and raised an action of damages against the Magistrates. In defence, the Magistrates pleaded, *inter alia*, that the clause did not deprive the inferior mills

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of the rights at common law, but that the object of it was to secure them a supply for *at least* three hours daily; and that if the superior tenants had acted illegally, they were not responsible for them. The Lord Ordinary found the letters orderly proceeded, and assoilzied the Magistrates, in respect that the advertisement ‘ could not, even if the assertion had ‘ not been strictly correct, mislead the representers, ‘ (Tassie and Company), who were well acquainted ‘ with the mills, and were bound to make, and must ‘ be presumed to have made, particular inquiries as ‘ to the state of the Subdean Mill with regard to ‘ water; and in respect the obligations incumbent on ‘ the Magistrates to their tenants are not to be gathered from the terms of the advertisement offering the mill to be let, but from the lease itself, afterwards entered into:’ and, farther, that Tassie and Company had been parties to an arrangement, under which the clause complained of had been inserted in the lease of Provan Mill. After this judgment was pronounced, Tassie and Company raised an action of damages against the tenants of the Provan and Town Mills, (see next case); and having reclaimed against it, the Court, of consent, found the letters orderly proceeded; but, in respect of the action against the tenants, remitted to the Lord Ordinary to hear farther on the claim of damages. Thereafter, his Lordship reported the case; and the Court found, ‘ that there are not grounds for subjecting the defenders in damages;’ and, therefore, assoilzied them.

J. HILL—W. DICKSON, W. S.—Agents.

TASSIE and COMPANY, Pursuers.—*Cranstoun—  
Cockburn—More.*

J. MILLER.—*Clerk—Robinson,—and*

J. WRIGHT, Defenders.—*Jeffrey—Pringle.*

No. 553.

*River.*—During the dependence of the preceding case, Tassie and Company raised an action against Miller, the tenant of Provan Mill, and Wright, the tenant of the Town Mill, alleging that they had illegally deprived them of the regular use of the water of the Hoganfield Loch, and concluded against them for damages ; and that they should be ordained ‘ to desist and cease, in time coming, from preventing a regular supply of water from coming to the ‘ said Subdean Mill.’ In defence, it was pleaded by Miller, that he was not obliged to keep the sluice of his mill-dam open for more than three hours in the twenty-four, which he had always done. And by Wright, that he was not obliged to let the water down till after it had served his own purposes. The Lord Ordinary, after having received the report of an engineer, ordered informations to the Court ; who found, that Miller was bound, by his lease, ‘ to open ‘ and draw, and to allow to remain open, the sluice ‘ in the dam of Hoganfield Loch, at least three hours ‘ in every twenty-four hours ; to allow the passage ‘ from the reservoir of Provan Mill of a quantity of ‘ water equal to that discharged during the said ‘ three hours from Hoganfield Loch, beginning the ‘ said discharge from the reservoir of the Provan ‘ Mill as soon as the water therein is in a state to ‘ work the said mill, and continuing it, without inter- ‘ mission, at the rate usually required to work the

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‘ said mill, and that whether the mill be working or  
 ‘ not : that Wright is bound to send down the water  
 ‘ regularly for the supply of the Subdean Mill, whe-  
 ‘ ther the Town’s Mill be working or not ;’ and al-  
 lowed a condescendence of the alleged damages.

HILL & HOPKIRK, W. S.—CARNEGIE & SHEPHERD, W. S.—  
 GIBSON & OLIPHANT, W. S.—Agents.

**No. 554.**      **MAGISTRATES of GLASGOW, Pursuers.**—*Jardine.*  
**J. AITCHISON, Defender.**—*Blackwell—Rutherford.*

June 18, 1822.      *River—Landlord and Tenant.*—This case was  
 SECOND DIVISION. connected with the preceding ones. Aitchison, who  
 Lord Cringletie: was tenant of the File Mill, having refused to pay  
                   B. his rent to the Magistrates of Glasgow, on grounds  
                                  similar to those urged by Tassie and Company, (see  
                                  No. 552), they raised an action of payment against  
                                  him ; and he brought a counter action of damages.  
                                  The Lord Ordinary decerned against him, and assoil-  
                                  zied the Magistrates ; and the Court, in respect of  
                                  the decision in the case of Tassie and Company a-  
                                  gainst Miller and Wright, adhered.

R. HENDERSON—W. DICKSON, W. S.—Agents.

**No. 555.**      **G. DALGLIESH, Suspender.**—*G. Bell.*  
**A. SCOTT, and ELLIOT and FOSTER, Chargers.**—  
                                  *Cranstoun—Christison.*

June 18, 1822.      *Messenger—Public Officer.*—Scott, a messenger, in-  
 SECOND DIVISION. dorsed a bill, accepted by Dalgliesh, to Elliot and Fos-  
 Lord Pitmilley. ter. The bill having been dishonoured, Scott, in his  
                   M’K.

official capacity, executed a charge, both for the behoof of Elliot and Foster and of himself, against Dalgliesh. The latter suspended, on the grounds,—1. That Elliot and Foster were not onerous holders; and, 2. That the charge having been given by Scott, who was an indorsee on the bill, was illegal. After some litigation, a new and unexceptionable charge was executed, of which a suspension was brought, on the allegation of non-onerosity, but which was ultimately repelled. Dalgliesh then claimed his expences in the first suspension, which he maintained was well founded on the second objection to the charge. The Lord Ordinary decerned in his favour; and the Court, by a majority, adhered.

The majority of their Lordships were of opinion that the charge was contrary to law; but those in the minority thought, that although it might be expedient to prohibit messengers from executing diligence in which they were personally interested, yet there was no rule in the law of Scotland which prevented them from doing so.

*Suspender's Authority.*—Farries, June 9, 1813, (F. C.)

*Charger's Authority.*—1. Hume, 390.

AINSLIE & M'ALLAN, W. S.—JOHNSTONE & LITTLE,—Agents.

SIR J. COLQUHOUN, Complainer.—*Forsyth—Mackenzie.*

No. 556.

T. D. DOUGLAS, Respondent.—*Clerk—Skene—Hope.*

*Member of Parliament—Freehold Qualification.*— June 18, 1822.

Douglas was admitted to the roll of freeholders of Dumbartonshire, on a charter of resignation in his favour, and instrument of sasine; and, in proof of the

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B.

condescendence of the amount ; and as the decree of payment was now unavailing against the raisers, he obtained an order on Wallace, Hamilton, and Company to consign the fund. This interlocutor having become final against them, they presented a petition, under 48. Geo. III, c. 151, § 16, alleging that this had happened by mistake ; and contended,—1. That an order for consignment by the Lord Ordinary was irregular, after a decree for payment by the Court ; and, 2. That as they meant to appeal, they would suffer, in the event of success, a loss of interest by consignment in a bank. But the Court adhered.

J. G. HOPKIRK, W. S.—MACMILLAN & GRANT, W. S.—Agents.

No. 558.

J. HAIG, Pursuer.—*Clerk—Buchanan.*

Mrs. FORBES and Others, Defenders.—*Baird.*

June 20, 1822.

SECOND DIVISION.

Lord Pitmilley.

F.

*Expences.*—The case, No. 8, having returned to the Lord Ordinary to hear parties on expences, and his Lordship having decerned against Haig for payment of those incurred by Mrs. Forbes and others, subsequent to their appearance in the action, the Court refused a petition, without answers.

GIBSON, CHRISTIE, & WARDLAW, W. S.—G. WILSON,—Agents.

No. 559.

Hon. Miss F. C. M'KENZIE and Others, Petitioners.  
—*Moncreiff.*

Hon. Lady M. F. E. S. H. M'KENZIE, Respondent.\*

June 20, 1822.

SECOND DIVISION.

F.

Decree applying the judgment of the House of Lords, in the appeal at the instance of the respond-

\* See Fac. Coll. Nov. 24, 1818, No. 190.

ent, finding, ' that by the terms of the deed of entail  
 ' in question, the disposition in favour of the appel-  
 ' lant, M. F. E. S. M'Kenzie, by which she can make  
 ' title to the lands and estates in question, is, by  
 ' force of the words in such deed, constituting her an  
 ' heir of entail substituted on failure of her brother,  
 ' F. J. M'Kenzie, and the other heirs and substi-  
 ' tutes by the said deed appointed to succeed to the  
 ' lands and estates, prior to the disposition in favour  
 ' of the said appellant ; and, therefore, it is declared,  
 ' that as her title to the said lands and estates is only  
 ' by force of the words in such deed of entail, con-  
 ' stituting her expressly an heir of entail so substi-  
 ' tuted, the said appellant is bound, by the condi-  
 ' tions, declarations, restrictions, limitations, clauses  
 ' irritant and resolute, contained in the said deed  
 ' of entail.'

INGLIS & WEIR,—W. S. Agents.

DUKE of ATHOLL and Others, Pursuers.—*Clerk*— No. 560.

*Cranstoun—Keay.*

W. DALGLIESH, Hon. W. MAULE, and Others, De-  
 fenders.—*Jeffrey—Moncreiff—Jardine—Alison.*

*Solidum et Pro Rata—Bona et Mala Fides.*— June 20, 1822.

The defenders having erected stake-nets in the  
 river Tay, for fishing salmon, opposite to their re-  
 spective properties, and each on his own account,  
 the Duke of Atholl and others obtained decree of  
 declarator, in an action raised in 1804, of the il-  
 legality of this mode of fishing, and of damages  
 against them,\* which was affirmed, on appeal, on

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\* See 7th March 1812, Fac. Coll., No. 158.



the 20th June 1816. The case having been sent back to the Lord Ordinary, to hear parties on the amount of the damages, various points were raised; and, particularly, 1. Whether the defenders were liable, conjunctly and severally, or whether they were only liable for the damage occasioned by each of them individually? and, 2. Whether they could avail themselves of a plea of bona fides, founded upon their ignorance of the unlawfulness of this mode of fishing, to the effect of diminishing their liability? On this last point Maule endeavoured to shew, that, for special reasons, the plea of bona fides ought to acquit him from the claim of damages altogether. The Court, on the report of the Lord Ordinary, ‘re-  
 ‘pel the plea of bona fides pleaded as to all the de-  
 ‘fenders: find damages due to the pursuers from  
 ‘the dates of citation, but that the defenders are not  
 ‘liable singuli in solidum; and, before farther an-  
 ‘swer, on the point of damages, find it expedient,  
 ‘under all the circumstances of this case, that, in-  
 ‘stead of remitting to a jury to assess the damages,  
 ‘issues of fact should be settled and tried by a jury,  
 ‘with regard to the extent of the loss sustained by  
 ‘the pursuers, and the profits derived by the de-  
 ‘fenders, from the use of the stake-nets, betwixt the  
 ‘dates of citation and the removal or discontinuance  
 ‘of the stake-nets;’ and remitted to the Lord Ordinary to proceed accordingly.

*Pursuers Authority.*—Strahan, June 17, 1688, (14710).

*Defenders Authorities.*—(1.)—Pothier de Ob. 148, 149; 1. Stair, ix, 5; 2. Voet, ii, 8 & 9.—(2.)—2. Ersk. i, 25; 2. Stair, i, 24; Grant, Feb. 9, 1765, (1760); Lawrie, June 21, 1769, (1764); Scott, Feb. 25, 1795, (15700).

A. CAMPBELL, W. S.—H. DAVIDSON, W. S.—J. THOMSON, W. S.  
 —Agents.

DUKE of ATHOLL and Others, Pursuers.—*Clerk—* No. 561.  
*Cranstoun—Keay.*

Hon. W. MAULE, Defender.—*Jeffrey—Moncreiff—*  
*Alison.*

*Expences.*—This was a branch of the preceding case. The Lord Ordinary had decerned against all of the defenders for the expences of process prior to the appeal, in terms of an interlocutor finding them due. Maule reclaimed against this decree, alleging that the interlocutor was not applicable to him : that he had been successful in a great part of the cause ; and that the expences ought to be modified. But the Court, holding that he was in the same situation as the other defenders, adhered.

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 F.

J. THOMSON, W. S.—J. YUILL, W. S.—Agents.

OCHILL TURNPIKE TRUSTEES, Pursuers.—*Cranstoun* No. 562.  
*—Gordon—Hope.*

J. HORN, Defender.—*Jeffrey—Walker.*

This was a special case. The Ochill Turnpike Trustees having agreed to contribute one-half of the expence of a road to be formed by the Kinross-shire Trustees, raised an action against Horn, as personally responsible for repayment of certain alleged superadvances, which, it was said, had been paid to him as convener, and acting on behoof of the latter Trustees. He denied that he had drawn more than was agreed on, or that he was personally accountable ; and the Lord Ordinary found, that ‘ the pursuers have not ‘ shewn any contract on the part of the defender, or

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 F.

‘ engagement undertaken by him,’ which could warrant the conclusions of the libel ; and, therefore, as-soilzied him ; and the Court adhered.

TAIT, YOUNG, & LAWRIE, W. S.—G. WILSON,—Agents.

No. 563. W. MAULE, Suspender.—*Jeffrey—Skene—Whigham.*  
W. SOMMERS, Charger.—*M’Farlane.*

June 21, 1822.

FIRST DIVISION.

Lord Gillies.

H,

*Prescription—Judicial Admission.*—In 1811, T, and W. Sommers raised action against Maule before the inferior court for payment of a tavern-bill, said to have been contracted by him in 1800. Defences were lodged, in which Maule stated that he had at that time frequented the tavern ; that he believed he had paid all claims made upon him ; but agreed, that ‘ if the pursuers can still shew that the defender ‘ got any thing from them which he omitted to pay ‘ for at the time before he left the house, he will ‘ cheerfully pay the same still, notwithstanding of ‘ the neglect on the part of the pursuers.’ No plea of prescription was entered ; and as no farther appearance was made, decree in absence passed against him, on which he was charged. He then suspended, and pleaded the triennial prescription ; but the Lord Ordinary, ‘ in respect of the terms of the defences ‘ which were lodged by the respondent (suspender) ‘ in the inferior court, repels the defence of prescription ;’ and the Court adhered.

*Suspender’s Authority.*—Clarkson’s Trustees, June 8, 1820, (F. C.)

T. JOHNSTONE,—J. LAIDLAW, W. S.—Agents.

**MAGISTRATES of LINLITHGOW, Pursuers.**—*Moncreiff* No. 564.  
—*Cockburn.*

**A. MITCHELL and Others, Defenders.**—*Jeffrey*—*Jardine.*

*Prescription.*—In 1677, Charles II granted to the Earl of Linlithgow a tack for nineteen years of the customs leviabie at the Bridge of Linglithgow. This tack was assigned to the town, by whom an act of parliament was obtained, in 1685, perpetuating ‘ the foresaid imposition formerly granted, as it is now paid by all passengers, &c. conform to use and wont, passing the river of Avon betwixt the west bridge and mouth of Avon.’ Under this title the Magistrates, in 1813, raised an action against Mitchell and others for payment of toll-dues at a ford called Jinkabout, situated within the above limits. The defenders admitted that toll-dues had been exacted at different places on the river; but it was found by the verdict of a jury, that the Magistrates had ‘ not been in the general practice, for forty years and upwards prior to the 26th day of January 1813, of levying of custom at the ford of Jinkabout, on the said river Avon.’ It was then argued by the Magistrates, that they held an undivided and universal grant of levying toll-dues on the river below the west bridge; and that as it was admitted that they had levied them at different points, so possession at any one spot preserved it entire everywhere else within the line of its operation. The Lord Ordinary, in respect of the terms of the grant and the verdict, assoilzied the defenders; and the Court adhered.

June 21, 1822.

SECOND DIVISION.

Lord Cringletie.

M<sup>c</sup>K.

*Pursuers Authorities.*—Skene, Jan. 25, 1774, (10746); Town of Paisley, July 30, 1710, (10732).

*Defenders Authority.*—Miller, June 15, 1757, (10738).

A. WATSON, W. S.—R. RUTHERFORD, W. S.—Agents.

No. 565. H. R. DUFF, Pursuer.—*A. Connell—J. Tait.*  
J. GRANT, Defender.—*Cranstoun—Mackenzie.*

June 21, 1822.

SECOND DIVISION.

Lord Pitmilly.

F.

No general point was decided in this case. It was an action by Duff, to have it declared that a certain piece of ground claimed by Grant belonged to him. The Lord Ordinary found that the action was neither supported by Duff's titles nor by a contract on which he libelled; and, therefore, assoilzied the defender; and the Court adhered.

TAIT, YOUNG, & LAWRIE, W. S.—T. MACKENZIE, W. S.—Agents.

No. 566. A. SPEIRS, Suspender.—*Clerk—Ivory—Speirs.*  
ROYAL BANK, Chargers.—*Bell—Alison.*

June 22, 1822.

FIRST DIVISION.

Bill-Chamber.

Lord Kinnedder.

H.

*Cautioner.*—Speirs and others granted a bond, in 1810, to the Royal Bank, relative to a cash-credit, binding and obliging themselves, 'conjunctly and severally, &c. to content and pay to George Mitchell, &c. for the use of the Royal Bank, &c. the foresaid sum of £600, or such part or parts thereof as shall be paid to me the said Archibald M'Nab, under the firm of Archibald M'Nab and Company, upon orders or drafts, &c. under the said firm, payable at the Royal Bank office in Glasgow.' This company consisted at that time of two partners, A. M'Nab and A. Barclay; but the latter was not men-

tioned at all in the bond. In January 1812, Barclay announced in a newspaper that he had ' ceased to have any interest in the concern carried on in Glasgow, under the firm of Archibald M'Nab and Company, upon the 31st of December 1811.' New partners were then assumed; but the company traded under the old firm; and M'Nab operated on the cash-credit as formerly. In 1819, the company became bankrupt; and a balance being due to the Bank, a charge was given to Speirs on the bond. He presented a bill of suspension, on the ground that the company was dissolved in 1811, by the retirement of Barclay: that this fact must have been known to the Bank, as they regularly received the newspaper in which the advertisement appeared; and that as, by the assumption of new partners, credit had been granted to a different company, he was not liable under the bond. It was not alleged, however, that special notice had been given to the Bank, either that Barclay was a partner or that he had retired. The Lord Ordinary refused the bill, ' in respect that, by the bond on which the charge proceeds, the suspender and certain other persons bound themselves, jointly and severally, to pay to the Royal Bank the sum of £600, or such part thereof as should be paid to Archibald M'Nab, under the firm of Archibald M'Nab and Company, and that it is not denied that an account was opened in the books of the Bank, and was operated upon in precise conformity to this stipulation;' and the Court adhered.

*Suspender's Authorities.*—Fell, 91, 105; 1. Bell, 285; 2. Bell, 283, 640, 645, 650; Hammond, June 24, 1812, (F. C.); Phillip, Feb. 21, 1809, (F. C.); Univ. of Glasgow, Nov. 18, 1790, (2104).

*Chargers Authority.*—M'Donald, July 5, 1810, (F. C.)

J. KERR, W. S.—J. DUNDAS, W. S.—Agents.

No. 567.

J. INNES, Suspender.—*Fullerton*.REID'S TRUSTEES, Chargers.—*Moncreiff*—*Brown*,

June 22, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Kinnedder.

B.

*Power of Trustees to Delegate—Clause.*—The Duchess of Portland, prior to her marriage, conveyed the barony of Hatton to Trustees, with ‘full power and liberty to sell and dispo[n]e the whole or any part of the said lands;’ and also ‘to appoint commissioners, factors, and agents under them, for managing the trust business.’ The trustees granted to certain persons ‘full power, warrant, and commission for us, and in our name, as trustees foresaid, to sell and dispose’ of the said lands. By these commissioners the lands were sold; and part having been acquired by Reid, his trustees sold it to Innes. The latter suspended a threatened charge for the price, alleging—1. That the title offered was defective, because the trustees of the Duchess of Portland were not entitled to delegate the power to sell to commissioners; and, 2. That he had bought the lands, on the faith that the entry of singular successors was taxed; whereas, by the titles, there was to be paid ‘the sum of 1s. sterling at the entry of each heir or singular successor to the said lands, &c. as use is of feu-farm;’ which last words, he alleged, rendered the taxation ineffectual. On the report of the Lord Ordinary, the Court refused the bill.

Observed, that the power to name Commissioners to execute the trust, was sufficient to warrant the delegation of the authority of the trustees; and that the case of Salmon, quoted in support of the second ground,

was not applicable, as in it singular successors were not mentioned.

*Suspender's Authority.*—(2.)—*Salmon*, July 25, 1751, (4181).

A DALLAS, W. S.—BRODIE & IMLACH, W. S.—Agents.

A. OLIVER, Suspenders.—*Gillies*.

No. 568.

J. HALLIBURTON, Charger.—*Bruce*.

*Bill of Exchange—Stamp.*—Sanders, an indorsee of a bill, accepted by Oliver and drawn by Wield, having raised diligence on it, recovered payment from the latter, and gave up the bill to him, but granted no assignation to the diligence. For this debt Wield ranked on the bankrupt estate of Oliver, and afterwards sold it to Halliburton. To enable Halliburton to do diligence against Oliver, an assignation was granted to him by Sanders, to which Wield consented. On receiving a charge, Oliver presented a bill of suspension, alleging,—1. That Halliburton's title was inept, as Sanders, having been paid by Wield, was no longer the creditor, and so could not assign the debt. 2. That as there ought to have been two assignations, one to Wield, and another by him to Halliburton, they had defrauded the revenue; and, 3. That he had a claim of compensation against Wield, which must be effectual against his assignee. The Lord Ordinary refused the bill; but the Court passed it, on caution.

June 22, 1822,  
SECOND DIVISION,  
Bill-Chamber.  
Lord Craigie,  
M'K.

W. MARTIN—TAIT & BRUCE, W. S.—Agents.



No. 569. D. RODGER, Advocate.—*Greenshields—Cockburn*.  
J. MILLER, Respondent.—*D. M'Farlane*.

June 22, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Craigie.

B.

*Servitude—Pro indiviso Property.*—Mary and Margaret Crichton, heirs-portioners of a burgage tenement, agreed to divide it, and executed dispositions in favour of each other. In that by Margaret, she disposed, inter alia, to Mary 'the use or privilege of  
' a road or passage, to be four feet in breadth,  
' along the back side wall of the tenement belonging  
' to James Reid, up to the said yard; and of a road  
' or passage from thence, of three feet in breadth,  
' to the said half of the yard hereby disposed.' Mary conveyed the other half to Margaret, with the use and privilege of the road of four feet; but nothing was said relative to that of three feet. Rodger, who was Mary's singular successor, pretending that he had exclusive right to the latter road, attempted to build a wall on it, in order to protect himself, as he alleged, from a nuisance. This was resisted by Miller, as in right of Margaret, who maintained, that Rodger had only a right to a servitude, and not to the fee of the ground, which still remained pro indiviso property. The Dean of Guild having interdicted Rodger from building, he presented a bill of advocacy, which the Lord Ordinary refused, in respect (as stated in a note) 'that the other sister  
' still remained the common proprietor of the ground  
' occupied by the road, subject to the servitude; and  
' the respondent, as coming in the right of that  
' sister, has a title and interest to maintain that the  
' ground shall only be used as a road, and not occu-

‘pied by buildings of any sort.’ To this judgment the Court adhered.

J. GEMMEL—GREIG & PEDDIE, W. S.—Agents.

A. BLACK, Suspender.—*Thomson—Cockburn.*  
P. LORIMER, Charger.—*Solicitor-General Wedderburn.*

No. 570.

*Feudal Title.*—The old post-office of Edinburgh was, in 1779, disposed by the Magistrates of Edinburgh ‘to Robert Oliphant, Esquire, as Deputy Postmaster-General of Scotland, and his successors in office, Deputy Postmasters-General for Scotland, for the use of the public,’ to be held in free burgage; and sasine was given to Oliphant in the above terms. No titles were made up to the property by his successors in office; and, in 1819, Lord Caithness, as Deputy Postmaster-General for Scotland, disposed the subjects to Lorimer, with procuratory of resignation, who again sold them to Black, and proposed to grant a disposition, containing an assignation to the procuratory. To this title Black objected,—1. That Lord Caithness had no feudal right to the property, as he had in no way connected himself with Oliphant, the vassal last infeft; and, 2. That even although he had a complete title, yet as he held the property in his official character, and specially for the use of the public, he had no right to sell it without competent authority. In order to try these questions, a bill of suspension was presented, which, on the report of the Lord Ordinary, the Court passed.

June 25, 1822.

FIRST DIVISION.

Bill-Chamber.

Lord Kinneder.

TOD & ROMANES, W. S.—CUNNINGHAM & BELL, W. S.—Agents.

No. 571. Sir W. M. NAPIER and Others, Complainers.—  
*Blackwell.*

T. GRIERSON, Respondent.—*Cathcart.*

June 25, 1822.

FIRST DIVISION.  
 D.

*Member of Parliament—Freehold Qualification—  
 Sasine.*—Grierson claimed to be inrolled a freeholder of the county of Renfrew, as liferenter of the lands of Pollocktown and Kendieshead, forming part of the barony of Pollock. In support of his claim, he produced a crown-charter in favour of Sir J. Maxwell, conveying ‘ totas et integras villam et terras de Pollocktown, &c. Item, ‘ totas et integras terras de Kendieshead,’ declaring, ‘ quod sasina suscipienda nunc et in omni tempore futuro super dictas terras de Kendieshead, vel super fundum ullius portionis dict. terrarum, per traditionem terræ et lapidis fundi earundem solummodo sine ullo alio symbolo ; est, eritque, tam valida et sufficiens sasina pro integris terris, decimis, aliisque antea disposit, ac si particularis sasina suscepta erat super unamquamque partem et portionem earundem, et per traditionem omnium solitorum symbolorum, quamvis separata tenementa sint diversarum denominationum, jaceant discontigue, et requirerent separatas sasinas et divorsa symbola.’ 2. He founded on a disposition and assignation to the liferent of the lands ; and, 3. An instrument of sasine, in which the notary, after stating that the Sheriff had given, in virtue of the above clause, liferent possession both of Pollocktown and Kendieshead, certified, ‘ Quanquam ‘ sasinam dict. vicecomes dedit per traditionem terræ ‘ et lapidis fundi dict. terrarum de *Kendieshead*, pro ‘ integris dict. terris aliisque antea mentionat. vir-

‘ tute dispensationis predict.’ &c. and ‘ Acta erant  
 ‘ hæc omnia secundum dict. cartam et præceptum sa-  
 ‘ sinæ ante dict. ac debite et legitime in omnibus su-  
 ‘ per fundum dict. terrarum de *Polloktown*, virtute  
 ‘ dispensationis predict.’ &c. On these titles the  
 freeholders inrolled Grierson. Against this, Sir W.  
 M. Napier and others complained, alleging,—1. That  
 the sasine was inept; for although the charter author-  
 ized infestment to be given upon the lands of Ken-  
 dieshead, or on any part of them, by delivering earth  
 and stone thereof, yet this was not done, for the in-  
 strument bears, that infestment was given upon the  
 lands of Pollocktown, by delivery of earth and stone  
 of Kendieshead; and, 2. That even were this legal,  
 there was no evidence that the notary or witnesses  
 saw that the earth and stone had been taken from  
 these lands. It having been alleged that the lands  
 of Kendieshead and of Pollocktown were completely  
 discontiguous, and at a distance from each other, the  
 Court remitted to the Sheriff of the county to ascer-  
 tain the fact; and he having reported that they were  
 contiguous and adjacent, the Court dismissed the com-  
 plaint.

*Complainers Authorities.*—(1.)—2. Craig, vii, 14.—(2.)—2. Ross, 178, 191,  
 198; 2. Stair, iii, 16; Wight, 223.

*Respondent's Authorities.*—(2.)—2. Stair, iii, 17; 4. M'Kenzie, p. 59; 2.  
 Bankt. iii, 40; 2. Ersk. iii, 34; Spottis. Writs, 221.

A. PEARSON, W. S.—T. GRIERSON, W. S.—Agents.

granted by M'Lean and Balfour, ' whereby they  
 ' oblige themselves to pay up the whole sums ob-  
 ' tained from the Commissioners of Exchequer bills,  
 ' in the bond for which the pursuer had been bound  
 ' for them, and to deliver up to him his obligation,'—  
 decerned against him. And the Court being satis-  
 fied that M'Lean had been duly discussed, and that  
 the other defence was, in point of fact, unfounded,—  
 adhered, so far as regarded these points; but remit-  
 ted to his Lordship to hear as to certain claims of  
 compensation.

*Defender's Authorities.*—1. Stair, xvii, 3; 3. Ersk. iii, 61; 1. Stair, xvii, 5;  
 1. Bell, 265; 3. Ersk. iii, 66; 3. Ersk. v, 11.

J. BALFOUR, W. S.—J. YOUNG, W. S.—Agents.

No. 574.

D. SUTHERLAND, Suspender.—*Menzies*.

J. MORRISON, Charger.—*Forsyth*.

June 26, 1822.

FIRST DIVISION.

Bill-Chamber.

Lord Kinnedder.

D.

*Bill of Exchange—Vitiation.*—Sutherland present-  
 ed a bill of suspension of a charge on a bill accepted  
 by him, which he alleged had been vitiated, by the  
 date being altered. The Lord Ordinary refused it,  
 ' in respect the suspender was acceptor of the bill  
 ' charged on: that it is admitted to have been grant-  
 ' ed for a debt justly due, and still owing; and that,  
 ' by the invoice produced, it appears that the altera-  
 ' tion of the date was made before it was accepted.'  
 But the Court, of consent, remitted to his Lordship  
 to pass the bill, on caution.

*Suspender's Authorities.*—Grahame, Jan. 17, 1798, (1458); Murehie, July 17,  
 1796, (1458); Bryce, Nov. 16, 1810, (F. C.); Callender, Dec. 10, 1812,  
 (F. C.); Chitty, 133.

J. CAMERON—J. PHILLIPS—Agents.

EARL of TRAQUAIR and Others, Pursuers.—*Cranstoun*  
—*Walker*.

SIR R. B. HENDERSON and Others, Defenders.—*Clerk*  
—*Jameson*.

No. 575.

*Writ—Vitiation*.—In 1812, the late Mr. Anstruther executed two deeds for regulating the succession to his estates. By the one, he disposed his estate of Ardit to his mother, Mrs. Landale or Anstruther, and her heirs, in fee, reserving the liferent; and, by the other, he, for various purposes, conveyed all his other heritable and moveable property to 'the 'Honourable Sir J. Stuart of Fettercairn, Baronet, 'one of the Barons of his Majesty's Court of Exchequer in Scotland; R. B. Henderson, Esquire, of Earlsball; J. Cheape, Esquire, of Rossie; Major 'Henry Cheape, his brother, in the service of the 'Honourable the East India Company, and to J. Heriot, Esquire, of Ramornie, writer to the signet, 'as trustees,' and to any other person to be named by him or assumed by them; a majority of the accepters to be a quorum; 'and, failing all my said 'trustees named and to be named, or assumed, by 'non-acceptance, death, or otherwise, then to the 'said Mrs. E. Landale, otherwise Anstruther, and 'her nearest heirs and assignees whomsoever;' and, in a subsequent clause, he appointed them to be his executors. His mother died in April 1814, leaving her estate to a sister of Major Cheape. This, it was alleged, offended Mr. Anstruther, and gave rise to a dispute between him and the Major. In July of the same year, he cancelled the deed executed in favour of his mother; and, on his death, in 1819, it was dis-

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FIRST DIVISION.

Lord Alloway.

H.

covered that a pen had been drawn through the words in the trust-deed which are marked by italics; but they were perfectly legible. The pursuers, who were heirs-portioners of Mr. Anstruther, brought a reduction of the trust-deed, on the grounds,—1. That it was null, as obliterated and vitiated in substantialibus. 2. That the intent and meaning of it was rendered inconsistent, contradictory, and not capable of being understood or carried into effect; and, 3. That, by the death of his mother, and the execution of different deeds, by which Mr. Anstruther had subsequently conveyed away part of the trust-estate, the disposition to the trustees did not apply to his situation at his death; nor was it intended by him to regulate his succession. But the Court, (on the report of the Lord Ordinary), holding that the deed had not been vitiated in substantialibus, and that it was capable of being carried into effect, assoilzied the defenders.

*Pursuers Authorities.*—4. Stair, xlii, 19; 1. Bankt. ii, 34; 3. Ersk. ii, 20; Pittillo, Nov. 22, 1671, (11536); Brown, June 20, 1701, (11541); Lord Bute, July 18, 1712, (11545); 1. Dow, 487; Nasmyth, June 27, 1831, (House of Lords).

*Defenders Authorities.*—4. Stair, xlii, 19; 3. Ersk. ii, 20; Wright, Feb. 8, 1672; Kemp, March 2, 1802, (16949); 28. Voet, iv, 3; 1. Brown's Ch. Rep. 11; Doe, Doug. Rep. 684.

J. YOUNG, W. S.—J. HERIOT, W. S.—Agents.

No. 576.

W. ELLIS, Pursuer.—*Jeffrey—More.*

J. CONNEL, Defender.—*Cockburn—Maitland.*

June 26, 1822.

SECOND DIVISION.

Lord Pitmilley.

B.

*Bankrupt—Solidum et Pro Rata—Stamp—Agent's Certificate—25. Geo. III; c. 80.*—Connell and others, creditors on the sequestrated estate of T. Kerr, ad-

addressed a letter to the trustee, desiring him to take the opinion of counsel relative to certain questions of usury, and 'to prosecute the said, &c. or any other person concerned, upon the charges of usury.' The trustee, accordingly, employed Mr. Ellis to raise an action against two persons, from which they were assolizied. For payment of his account, Mr. Ellis brought an action against the creditors who had signed the letter. Connel's defences were,—1. That the trust-estate was liable for the expences in the first place. 2. That he was not responsible for more than his proportion of them. 3. That the mandate was not stamped; and, lastly, That Mr. Ellis had forfeited all right to sue for his account, because he had not taken out a certificate, during the period of its currency, on the 1st of November of each year, in terms of 25. Geo. III, c. 80. The Lord Ordinary repelled the defences; and the Court, being satisfied that Mr. Ellis had duly observed the statute, adhered.

Observed, that the statute did not require that a certificate, issued subsequent to 1785 (the date of the act), should be taken out on the 1st November; but that it was sufficient if it was obtained (in the words of the act) 'ten days previous to the expiration of the time for which it was granted.'

W. & A. G. ELLIS, W. S.—D. CHRISTIE,—Agents.

R, HUNTER and S. MEEK, Suspenders.—*Alison*.  
J. M'NAB, Charger.—

No. 577.

*King's Freeman—Burgh Royal*.—By a regulation of the burgh of Haddington, all butchers are prohibited from exercising their trade except in the public

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SECOND DIVISION.  
Lord Pitmilley  
F.



market; and, by a decision in the case of Sandie against the Incorporation of Fleshers of that burgh,\* it was found that the King's freemen were obliged to conform themselves to the same rules as those imposed on other freemen. But an opinion was expressed, that if an exorbitant rent were demanded, they might carry on their business in any other proper place. Hunter and Meek, butchers and King's freemen, having been fined by the Magistrates for exposing meat to sale in shops, after a stall had been offered to them in the public market, at £6 per annum, suspended a charge by the procurator-fiscal, on the ground that the rent was exorbitant. But the Lord Ordinary and the Court, being of opinion that the terms were reasonable, found the letters orderly proceeded.

A. STIVENS—HAY DONALDSON, W. S.—Agents.

No. 578.

D. HALKET, Petitioner.—*Fullerton*.

J. ROGERS, Respondent.—

June 27, 1822.

SECOND DIVISION.  
F.

*Process*.—An action of reduction of a disposition, granted by a person about ninety years of age, was raised by his son, on the head of fraud, and called in Lord Cringletie's roll on the 13th June, when an order to satisfy the production was issued; but his Lordship being unable to call his roll again till 5th July, the Court, in respect of the urgency of the case, and the necessary absence of his Lordship, remitted to Lord Pitmilley to proceed with it.

R. HOTCHKIS, W. S.—J. DONALDSON,—Agents.

\* 26th January 1819, Fac. Coll.

[**J. FINLAYSON and Others, Suspenders.**—*Buchanan.* No. 579.  
**W. MURRAY and SON, Chargers.**—*Gorden.*

*Proof—Bill of Exchange.*—The suspenders accepted a bill to William and George Murray, agents for the Commercial Bank at Tain. George having retired from the office, and the son of William having been substituted in his place, William indorsed the bill, in name of the old firm, to the new one of William Murray and Son. On a charge to pay it, the granters suspended, on the allegations,—1. That the bill had been accepted as a bonus to induce William and George Murray to accede to a composition-contract; and, 2. That the chargers were not onerous bona fide indorsees. They offered to prove their first ground by the bank-books kept by William and George Murray. But the Lord Ordinary found it ‘incumbent on the suspenders to prove, by the writ or oath of the chargers, that they are not onerous indorsees.’ The Court altered this interlocutor; and remitted to his Lordship, to allow the suspenders a proof in the mode offered by them.

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 SECOND DIVISION.  
 Lord Pitmilley.  
 B.

*Chargers Authorised.*—S. ERsk. III, 26; KIDD, 277.

J. PEDIE, W. S.—A. STORIE, W. S.—Agents.

**F. MACDONALD, Pursuer.**—*Matheson.* No. 580.  
**Mrs. MIDDLETON, Defender.**—*Cranstoun—Buchanan.*

This was a question of fact. Macdonald raised action against Mrs. Middleton, on an alleged agreement to pay certain bills granted by her late father; or, at least, as an intromitter with his effects;

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 SECOND DIVISION.  
 Lord Pitmilley.  
 B.

and, particularly, as having taken possession of a farm which it was said belonged to him. She denied the grounds of the action; and stated, that she had derived right to the farm from her deceased husband, who had been the tenant. The Lord Ordinary and the Court, judging from a variety of documents, as-soilzied her.

J. GORDON, W. S.—M'QUEEN & M'INTOSH, W. S.—Agents.

No. 581. A. DUTHIE and Others, Advocators.—*Cranstoun—Skene.*

PATERSON and CATLEY, Respondents.—*Clerk—More.*

June 27, 1822.

SECOND DIVISION.  
Lord Pitmilley.  
B.

*Retention.*—Duthie and others, as managers of the Bon Accord Company, sold 42 casks of oil to Stewart, a general agent, which, at his request, they divided into two parcels, the one of 14 and the other of 28 casks, and rendered to him separate invoices accordingly. On the day after the sale, a bill, drawn by one Sanderson in favour of the Bon Accord Company, and accepted by Paterson and Catley, for £844 10s. 8d., (being a sum corresponding to the price of the parcel of 28 casks), was given to the Company. Stewart put his name on this bill as indorser; and having become bankrupt, the Bon Accord Company, who were his creditors, insisted on retaining both the bill and the 28 casks of oil, till paid their debt. Paterson and Catley, alleging that they were the purchasers of this parcel, raised action against the Bon Accord Company, either to deliver it to them or to restore the bill; and the inferior court decerned for restitution of the bill. In an advocacy, the Lord

Ordinary repelled the reasons, ' in respect the invoice of the 42 casks of whale-oil separates the oil into two distinct parcels, one of which parcels consists of 28 casks, each cask being distinctly numbered, containing in all 20 tons and 27 gallons, the stipulated price of which amounted to £844 : 10s. 8d. : that the bill in question is granted for this precise sum, and is an acceptance by the defenders in the advocacy, Messrs. Paterson and Catley, drawn by their mandatory, Mr. Sanderson, in favour of the advocates, the Bon Accord Whale Fishing Company, for value, as advised ; finds it sufficiently instructed that the advocates recognized the defenders as the purchasers of the 20 tons of oil, for which they took their bill ; and finds, that the above-mentioned evidence of this fact is strengthened by the letters of correspondence produced, and the inferences arising therefrom ;' and the Court adhered.

*Advocates Authorities.*—1. Bell, 205 ; 1. Stair, xii, 16 ; 3. Ersk. ii, 34 ; Boylston, Jan. 4, 1672, (2. Stair, Decis. 54).

W. DUTHIE, W. S.—A. PATERSON,—Agents.

J. RUTHERFORD and Others, Petitioners.—*Napier*. No. 582.  
MAGISTRATES of PERTH, Respondents.—*J. C. Craigie*.

*Public Prison.*—By two acts of parliament for erecting a new jail at Perth, commissioners were authorized to form it ' with proper and sufficient yards, courts, court-offices,' &c. ; and, in 1817, it was declared a legal prison. No express power having been given to permit the prisoners to walk in these

June 28, 1822.

BOTH DIVISIONS  
H.

yards, Rutherford and others, who were confined for debt, presented a petition, praying that they might be allowed access to the airing grounds; which the Court granted, subject to such regulations as the Magistrates should see fit to make.

J. & W. MURRAY, W. S.—Agents.

No. 583. SMITH and JAMESON, Petitioners.—*Bell—Green-shields.*

PEASE, WRAYS, and TRIGG, Respondents.—*Blackwell—Marshall.*

July 2, 1822.

FIRST DIVISION.

S.

*Interim Execution.*—After decree for a certain sum of expences had been pronounced in favour of the petitioners, they were found entitled to the expences of some farther proceedings, (see No. 508), of which an account was ordered to be given in, to be remitted to the auditor to tax. The respondents having at this stage appealed to the House of Lords, the petitioners prayed the Court to allow the remit to proceed; thereafter to decern for the additional expences, and to award interim execution pending appeal; which was granted.

J. WEMYSS, W. S.—D. & A. THOMSON,—W. S. Agents.

No. 584. Captain M'ALISTER, Advocate.—*M'Neill.*  
W. CAMPBELL, Respondent.—*Gordon.*

July 2, 1822.

FIRST DIVISION.

Lord Alloway.

D.

This was a question relative to the straighting and fixing of marches, and which depended on a proof. The Sheriff having pronounced a judgment, by which M'Alister alleged he was deprived of a piece of

ground, which was his property, he brought an advocacy ; but the Lord Ordinary and the Court, on reviewing the proof, remitted simpliciter to the Sheriff.

C. M'ALISTER, W. S.—MACKENZIE & INNES, W. S.—Agents

W. SCOTT, (CHALMERS' TRUSTEE), Pursuer.—*Jeffrey* No. 585.  
—*Pyper*.

W. WILSON, (J. WILSON'S TRUSTEE), Defender.—  
*Murray—Jameson*.

*Process*.—Chalmers having conveyed to Wilson right to a lucrative succession, Scott, his trustee, raised an action of reduction of the deeds, on the grounds, July 2, 1822.  
FIRST DIVISION.  
—1. That they had been elicited upon false and Lord Meadowbank.  
D.  
fraudulent pretences from Chalmers, and at a time when he was intoxicated, and was ignorant of their nature; and, 2. That, at least, he was not then aware of the value of the succession, and the deeds were granted to his enorm lesion. This action was remitted to the Jury Court; but, before going to trial, Scott raised another action of reduction of the same deeds, in which, besides libelling on the above grounds, he alleged that Chalmers was of a weak and facile disposition,—was, at the date of executing the deeds, much addicted to intoxicating liquors: that, from the inadequacy of the consideration,—the particular time at which they were granted,—the employment of an agent who was unacquainted with the whole matter,—and several other circumstances condescended on, the deeds were evidently fraudulent. The conclusions were the same as in the first action, with the exception, that an alternative one was in-

troduced, that the deeds, if not reduced, should be found to have been made in trust. The Lord Ordinary, in reference to the defences, dismissed the action, in so far as regards the reductive and rescissory conclusions, 'in respect of the previous process depending in the Jury Court,' and, quoad the other conclusion, sisted process till the determination of that action. But the Court altered this interlocutor; appointed the necessary steps to be taken for retransmitting the original action from the Jury Court; and remitted to the Lord Ordinary to conjoin the two actions, and thereafter to proceed as he should see proper.

*Pursuer's Authorities.*—Maitland, Feb. 13, 1729, (4956); Mackie, Nov. 24, 1752, (4963).

CAMPBELL & MACK, W. S.—W. SMITH,—Agents.

No. 586,

W. WATSON, Pursuer.—*Forsyth.*

C. HOOD, Defender.—*Keay.*

July 2, 1822.

SECOND DIVISION.  
Lord Pitmilley.  
B.

*Principal and Agent—Implied Guarantee.*—Hood consigned goods to Watson for sale, who made advances upon them. Having sold them to one Paterson, for his bill at seven months, Hood expressed his dissatisfaction, and wrote, stating, 'that in consequence of your advance upon the goods, you should either have got cash or the bill in your name, and remitted us the balance, and charged a guarantee commission; or that, if you have taken the bill payable to me, that you still guarantee it, and charge the ordinary commission.' To this Watson answered, 'that, in all my course of business, I never

‘ did, in one instance, guarantee a sale to any one of  
‘ my constituents, unless that it was specially agreed  
‘ upon before the arrival of the goods; or, at all  
‘ events, before that any sales were made.’ In reply,  
Hood, after observing that Paterson was unknown  
to him, said, that, ‘ of course, we look to you for the  
‘ guarantee of the sale, either by yourself, or by any  
‘ other who will do it; and our advice is to you, di-  
‘ rectly to get the bill guaranteed, and remit us the  
‘ balance over the advance.’ On this subject Wat-  
son made no answer, but wrote, that he had dis-  
counted the bill, and had sent the balance. Paterson  
became bankrupt; and Watson having been obliged to  
retire the bill, raised an action for relief against  
Hood. His defence was, that Watson must be held  
to have guaranteed the bill. The Lord Ordinary  
remitted to merchants to state the custom of the  
trade; who reported, ‘ that, according to the custom  
‘ of merchants, an agent is not bound to guarantee  
‘ the payment of goods sold by him, unless required  
‘ to do so previous to the sale being effected; and no  
‘ such request was made by Robert Hood till long  
‘ after the sale had been communicated to him; nor,  
‘ in our opinion, did Watson incur any responsibility,  
‘ in consequence of not having the payment of the  
‘ goods guaranteed by another, after receiving Hood’s  
‘ letter desiring this to be done, because it is not cus-  
‘ tomary, and seldom possible, to procure such kind  
‘ of guarantees.’ They, however, stated, that they  
considered Watson to have acted irregularly, in not  
explicitly refusing to guarantee; but that the tenor  
of Hood’s letters had been, in some measure, the  
cause of this. The Lord Ordinary decerned against



Hood, but found no expences due; and the Court adhered.

D. FISHER—DONALDSON & RAMSAY W. S.—Agents.

No. 587.

G. BOOG, Pursuer.—*Skene—A. Thomson.*

R. M'LALEN, Defender.—*M'Farlane.*

July 2, 1822.

SECOND DIVISION.

M'K.

*Cessio*.—Decree of cessio was, in this case, opposed, on fraud and concealment of funds. And as the Court was satisfied that the pursuer had been guilty of falsehood on oath, in relation to them, when examined under a claim for the benefit of the act of grace, they refused it in hoc statu.

D. M'LEAN, W. S.—W. WILLIAMSON,—Agents.

No. 588.

J. and J. AUCHIE and COMPANY, Pursuers.—*Sandford.*

W. BURNS, Defender.—*Moncreiff—Hope.*

July 4, 1822.

FIRST DIVISION.

Lord Alloway.

D.

*Principal and Agent*.—In 1814, Burns consigned a parcel of Alover shawls, invoiced from 90s. to 78s. per dozen, to Dollar, Auchie, and Company, at Jamaica, a branch of Auchie and Company of Glasgow. A great part remained unsold for five years, of which notice was regularly given, and instructions requested as to the disposal of them; but no answer was returned. At last, the pursuers wrote, in March 1819, to the defender,—‘ We beg leave to  
‘ hand a state of your account, balance due us, of  
‘ this date, £115 : 2 : 6, which we beg you will re-  
‘ pay us; and we will give you an order on Dollar,  
‘ Auchie, and Company to deliver the goods of  
‘ yours in their hands. We shall expect your reply

' next week.' No answer was made; and the pursuers soon thereafter sold the shawls at 19s. 9½d. per dozen, for ready money, and raised action for a balance still due. In defence, it was alleged, that the shawls had been sold under the market-prices, and that the pursuers were bound to condescend on the names of the purchasers. The Lord Ordinary, after finding that the shawls had remained unsold for five years,—that it was not the custom either of the parties or of the trade to communicate the names of purchasers for ready-money,—and that no answer had been returned to the pursuers letters, found, that they ' were entitled, for their own indemnification, to ' dispose of the goods at whatever sum they would ' bring; and that, after having been so long kept as ' unsaleable in Jamaica, the price at which they were ' sold, so far below the invoice price, affords no presumption of improper conduct on the part of the ' sellers;' and, therefore, decerned in terms of the libel. The Court, after allowing a condescendence, refused a petition, without answers.

WELCH & EWART, W. S.—W. DOUGLAS, W. S.—Agents.

J. BLACKWELL, Complainer.—*Moncrieff—Murray.*

No. 589.

J. SMITH, Respondent.—*Dean of Faculty—Hope.*

*Member of Parliament—Freehold Qualification—*  
*Acquiescence.*—The lands of Westbarns, which were  
 valued in the cess-books at £852: 16: 7, including  
 those of Beilmouth, valued at £130: 4: 2, were sold,  
 in four different lots, to onerous purchasers. In January 1805, an application was made to the Commissioners of Supply to divide and apportion the valua-

July 4, 1822.

FIRST DIVISION.  
 D.

tion among these lots. The Commissioners accumulated the two valuations into one, thus making a sum of £988 : 9d. Scots, which they divided among the four lots ; and, on the 30th September 1806, pronounced decree, approving of the entries which were made in the cess-books in the names of the respective purchasers. As superior of one of these lots, valued at £406 : 18 : 9 Scots, Lord J. Hay was inrolled a freeholder of Haddingtonshire ; and Mr. Blackwell having obtained right to it, he, in October 1821, claimed to be admitted to the roll. He was opposed by Mr. Smith, who objected, that the valuation of £406 : 18 : 9 was a part of the sum of £988 : 9d., which was divided, in 1806, as one cumulo ; whereas it was composed of two separate cumulos, viz. £852 16s. 7d. effeiring to Westbarns, and £130 : 4 : 2 to Beilmouth, which formerly had always been separate and distinct. The freeholders having sustained this objection, Mr. Blackwell complained to the Court ; and maintained, that as the cess and public burdens had been paid from 1806, conform to the decree then pronounced by the Commissioners, and Lord J. Hay had been inrolled in virtue of it, the objection was barred by acquiescence and lapse of time. The Court sustained the complaint, ordained Mr. Blackwell to be admitted to the roll, and found expences due.

*Complainer's Authorities.*—Elphinstone, Sup. to Wight, 49 ; Campbell, Dec. 14, 1790, (8653) ; Ferguson, July 26, 1780, (Wight, 201) ; Aytean, July 1, 1800, and May 19, 1801, (No. 5 and 6, Ap. Property) ; Cunningham, Dec. 6, 1780, (8670) ; Lord Fife, June 16, 1774, (8665).

*Respondent's Authorities.*—Bell on Klection, 195, et seq. ; Sup. to Wight, 42, 47.

FORSYTH & M'DOUGALL,—J. SMITH, W. S.—Agents.

M'CORMICK and CARNIE, Suspenders.—*Greenshields*. No. 590.  
 J. M'CUBBIN and Others, (J. WILSON'S EXECUTORS),  
 Chargers.—*Jeffrey—More*.

*Joint Property—Good Will of a Newspaper.*—John and Peter Wilson, booksellers and stationers, established, in 1803, a newspaper, as one of the branches of their business. They were equally interested in the general concern; and, in 1809, Peter sold his share to a third party for a premium, who again, for a similar consideration, conveyed it to the suspenders. No written contract had ever been made; but these transactions were known to John Wilson, who continued along with the suspenders to trade in partnership, and to publish the newspaper, till 1821, when he died. By a deed of settlement, he authorized the chargers, as his executors, to dispose of his share of the copy-right or good will of the newspaper, either by public or private sale, and to make the first offer to the suspenders. They refused to purchase it; and presented a bill of suspension and interdict against a sale, maintaining that there was no such vested right in the person of John Wilson as could be transmitted to his heirs: that although his representatives might have a share in the copy-right of those newspapers which had been already published, yet they had none in those which were not in existence; and that were the sale allowed to proceed, a stranger might be obtruded on them, detrimental to the interests of the company. The Court, on the report of the Lord Ordinary, refused the bill.

July 4, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Cringletie.

Their Lordships were agreed that the copy-right or good will of a newspaper is a valuable privilege or

property, transmissible inter vivos, or to heirs; and that if, on the dissolution of the company, the surviving partners, who may be desirous to continue the publication, refuse to buy it, then, like the other rights of the deceased in the dissolved company, it must be sold for behoof of his representatives.

*Suspensers Authorities.*—Sime, March 1, 1804, (No. 3, Ap. Herit. and Mov.); Murray, Feb. 5, 1805, (No. 4, ib.); Hammond, & Vesey, 539.

*Chargers Authorities.*—1. Montague, 163; Crawshaw, 15. Vesey, 218; Longman and Rees, 2. Bos. and Pul. 67; Eden, 313; Nairn, Feb. 8, 1731, (10403); Earl of Calthness Nov. 19, 1748, (10415).

J. GEMMEL—J. GIBSON, W. S.—Agents.

No. 591.

J. MATHESON, Petitioner.—*Moncreiff*.  
R. SIMPSON, Respondent.—*Cuninghame*.

July 4, 1822.

SECOND DIVISION.

B.

*Inhibition.*—During the dependence of a suspension, at the instance of Matheson, an inhibition was executed against him by Simpson, the charger. A petition for recal was then presented by Matheson, in respect that he had found caution in the suspension. This was resisted, on the allegation that it was not now sufficient; and the Court refused the petition, except on new caution.

J. PEDIE, W. S.—E. M'BEAN, W. S.—Agents.

No. 592.

J. WATSON, Petitioner.—*Forsyth—Moncreiff*.  
D. SMITH and COMPANY, and Others, Respondents.—*Greenshields—Jeffrey—L'Amy*.

July 4, 1822.

SECOND DIVISION.

M'K.

*Bankrupt.*—The estates of D. M'Eachern and Company, and of D. M'Eachern, junior, and Company, were sequestrated as one company; and Wat-

son was chosen trustee. Having presented a petition for confirmation, he was opposed by the respondents, who alleged that the companies were quite distinct from each other; and that there ought to be a trustee appointed on each, in order to extricate their affairs. But the Court, seeing no satisfactory evidence of this averment, confirmed Watson as trustee.

*Petitioner's Authorities.*—Williams, June 1809, (F. C.); 2. Bell, 401.

*Respondents Authorities.*—2. Bell, 628 & 679; 1. Bell, 415.

D FISHER—W. GUTHRIE,—Agents.

M. CHRISTIE and Others.—*Hunter*,  
and

DAVID and MARY PATERSONS.—*M'Neill*.  
Competing.

No. 593.

*Condition si sine Liberis*—*Clause.*—By a trust-deed and settlement, the late James Robertson conveyed his whole heritable and moveable estates to certain trustees, for various purposes; and, lastly, he appointed them ‘to divide the residue of my whole  
‘ real and personal estate before conveyed, when  
‘ converted into cash, among the children of the  
‘ brothers and sisters of the deceased Mary Robert-  
‘ son, youngest daughter of the deceased James Ro-  
‘ bertson of Birnierigg, my mother, who shall be in  
‘ life at the time of my death, and that in equal  
‘ proportions, share and share alike.’ One of the sisters of his mother predeceased him, leaving two children, viz. David and Mary Paterson; and, on his death, a question arose, Whether they had a claim, under the above clause, to a share of the estate? or, Whether the whole of it belonged exclusively

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Lord Alloway.

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to Christie and others, the children of the surviving brothers and sisters? To settle this question, the trustees brought a multiplepinding, in which Christie and others maintained,—1. That, by the words of the clause, the claim by the Patersons was excluded; and, 2. That neither on the principle of representation, nor on the implied condition *si sine liberis*, (which they alleged was not applicable to collaterals), had they any right to a share. But the Lord Ordinary, ‘in respect of the unanimous decision of the Court in the case of *Wallace v. Wallace*, 28th January 1807, prefers the claimants, David and Mary Paterson, to the share of the residue of the funds which their mother, if alive, would have been entitled to, alongst with the other children of the brothers and sisters of Mary Robertson;’ and his Lordship afterwards refused a representation, in respect of the case of *Holt v. M’Kenzie*, February 2, 1781. To this interlocutor the Court adhered, ‘with this declaration, that the residue of the estate, real and personal, of the deceased James Robertson, falls to be divided among the children of the brothers and sisters of the deceased Mary Robertson, mother of the said James Robertson; and in the event of said children having died, leaving issue, that such issue are entitled to the share that would have belonged to the deceased parent, in the same manner as if such parent had been alive at the period of James Robertson’s death.’

*Christie’s Authorities*.—(1.)—Wishart, June 16, 1763, (2310).—(2.)—Burnett, Dec. 17, 1736, (4274); 36. Voet, ii, 2; 11. Mantica, 23, 27, 28; Burnett, Dec. 9, 1783, (8105); Omev, Nov. 19, 1788, (6340); Sempels, Nov. 15, 1792, (8108); 31. Dig. 1, l. 102; 6. Cod. 25, l. 6; 6. Cod. 42, l. 30; 3. Ersk. viii, 46; 57. Voet, i, 17; 1. Voet, xxxvi, 19; 10. Mantica, iii, 25; Magistrates of Montrose, Nov. 21, 1738, (6398); Yule, Dec.

20, 1738, (6400); Wood, June 28, 1789, (13403); Rongheads, Feb. 14, 1794, (6405); Fleming, June 6, 1798, (8111).

*Patersons Authorities*.—Holt, Feb. 2, 1781, (6602); Wallace, Jan. 25, 1807, (No. 6, Ap. Clause).

A. DOUGLAS, W. S.—N. McDONALD, W. S.—Agents.

J. STEWART, Pursuer.—*Maidment*.

No. 594

R. CRAWFORD, Defender.—*Graham Bell*.

*Cessio Bonorum*.—Stewart, a tide-waiter, having obtained decree of cessio without assigning any part of his salary, Crawford, a creditor, reclaimed, and prayed that a part of it should be ordered to be made over to the creditors; and that he might be appointed trustee. The Court refused the first, but granted the latter part of the prayer.

July 5, 1822.

FIRST DIVISION.  
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R. PITCAIRN, W. S.—A. SMITH, W. S.—Agents.

W. STIRLING and SONS.—*Moncreiff*—*Fullerton*—*Ivory*,—and

No. 595.

STIRLING and ROBERTSON.—*Jeffrey*—*Skene*.  
Competing.

*Bankrupt*—*Principal and Agent*.—More, as trustee for the creditors of A. Stirling, sold forty-nine shares of the stock of the Monkland Canal to Stirling and Sons, ex facie of the deed of sale, for their own behoof. Thereafter a sequestration, under the bankrupt statute, was awarded against Stirling and Sons, who were discharged on a composition-contract, and reinvested in their estates. Twelve of the forty-nine shares, (which were still undelivered by More), were claimed by Stirling and Robertson, who alleged

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FIRST DIVISION.  
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they were purchased for them by Stirling and Sons. In order to settle this claim, a multiplepinding was brought by More, and a declarator by Stirling and Robertson. The claim was resisted by Stirling and Sons, who stated, that they had purchased the whole forty-nine shares for themselves alone: that although it was true that they had entered into an agreement, prior to the sequestration, to sell twelve of them to Stirling and Robertson, yet, as no delivery had been made to them, the real right was transferred by the sequestration to the trustee: that these shares had been reconveyed to them; and that the personal obligation, and the claim of damages thence arising, were put an end to by the discharge. The Lord Ordinary, however, found, ‘ that, from the letters of ‘ correspondence produced, it must be held that the ‘ twelve shares in question of the Monkland Canal ‘ Stock were purchased by William Stirling and Sons ‘ for behoof of Stirling and Robertson; and, conse- ‘ quently, that Stirling and Robertson are entitled to ‘ obtain a conveyance to such of these shares as re- ‘ main unsold, and are still in medio, from Mr. More, ‘ the raiser of the multiplepinding, upon making ‘ payment to him of the stipulated price;’ and preferred them accordingly. To this interlocutor the Court adhered; but remitted a minor part of the case for the consideration of his Lordship.

*Stirling and Son's Authorities.*—1. Stair, xii, 16 & 17; 3. Ersk. iii, 34; 2. Bell, 121.

GIBSON, CHRISTIE, & WARDLAW, W. S.—MACMILLAN & GRANT,  
W. S.—Agents.

J. MORE, (STIRLING'S Trustee), Pursuer.—*Cranstoun* . No. 596.  
—*More*.

STIRLING and SONS, Defenders.—*Moncreiff*—*Ivory*.

*Arrestment*.—This was a branch of the preceding July 5, 1822.  
case. On 22d December 1821, (see No. 266), the Court had empowered More to sell the Canal shares, FIRST DIVISION.  
Lord Meadowbank.  
in virtue of a reserved power to that effect, provided the price was not paid by Stirling and Robertson, or by Stirling and Sons, within a certain period. Stirling and Robertson having failed to do so, raised action against Stirling and Sons for implement of their obligation to transfer the shares to them, or for damages; and, on the dependence, arrested a large sum, together with the shares, in More's hands. Thereafter payment of the price was tendered by Stirling and Sons; but More declined to accept of it, in respect of the arrestment. He then applied to the Lord Ordinary, and obtained warrant to sell the shares. Against this, Stirling and Sons represented, and pleaded,—1. That the obligation to convey, which lay on More, was not arrestable. 2. That the arrestment could not affect the rights of parties, as fixed by the final interlocutor of the Court; and, 3. That, at all events, they held liquid grounds of compensation against Stirling and Robertson. But the Lord Ordinary adhered, reserving all other questions; and the Court refused a petition.

*Defenders Authorities*.—(1.)—3 Ersk. iii, 6; 2 Bell, 76; 3 Ersk. iv, 10.

W. & A. G. ELLIS, W. S.—GIBSON, CHRISTIE, & WARDLAW,  
W. S.—Agents.

No. 597.      Mrs. M'ALLESTER, Petitioner.—*Moncreiff*.  
 TRUSTEES OF GENERAL M'ALLESTER, Respondents.  
 —*Fullerton*.

July 5, 1822.      *Husband and Wife—Aliment*.—Interim decree for  
 FIRST DIVISION. £200 of aliment in favour of the petitioner, at whose  
 S. instance an advocacy of an action of divorce, raised  
 against her by her late husband, was depending in  
 Court.

J. RUSSELL, W. S.—J. BRIDGES, W. S.—Agents.

No. 598.      J. M'LEAN, Suspender.—*Buchanan*.  
 COMMISSIONERS OF LORD M'DONALD, Chargers.—  
*Murray—M'Donald*.

July 5, 1822.      M'Lean having referred his reason of suspension  
 FIRST DIVISION. to the oath of the chargers, (see No. 339), and the  
 H. oath having been taken and reported, the Court  
 found it negative, and adhered to their former inter-  
 locutor.

M'QUEEN & M'INTOSH, W. S.—J. A. CAMPBELL, W. S.—Agents.

No. 599.      R. CRICHTON, Suspender.—*Forsyth*.  
 G. and R. DENNISTON and COMPANY, Chargers.—  
*Clerk—Shaw*.

July 5, 1822.      *Registry Acts*.—Denniston and Company agreed  
 SECOND DIVISION. to sell the ship Hamlet, of Port-Glasgow, to Rose,  
 Bill-Chamber. Barclay, and Company, for a certain price; but sti-  
 Lords Robertson & pulated, that the property should not be transferred  
 Craigie. until it was fully paid. The buyers, together with  
 M'K.

Crichton, granted three promissory-notes for the price, and the vessel was delivered to them. After they had been in possession for some time, they became bankrupt, and failed to retire the notes. The vessel was then sold under the sanction of their creditors, and the proceeds appropriated in part extinction of the notes. One of them being still unpaid, a charge was given on it to Crichton, who presented a bill of suspension, on various grounds; but chiefly, that the sale to Rose, Barclay, and Company was null, as it had not been completed in terms of the registry acts. To this Denniston and Company answered, that, by the terms of the bargain, the property of the vessel was not to be transferred till the full price was paid: that the registry acts did not relate to the contracts antecedent to the transfer of the property, but only to the mode of framing the title by which it is actually conveyed away; and that, at all events, a valid title had been granted by them to the purchaser, under the sale by the creditors of Rose, Barclay and Company, and who must be regarded as their assignee. The Lord Ordinary refused the bill, in respect of no caution; but, on an offer at the bar, the Court passed it, on condition that caution were found within a limited time.

*Suspender's Authorities.*—26. Geo. III, c. 60, § 70; 34. Geo. III, c. 68; Leitch, May 30, 1819, (F. C.); Spence, July 20, 1809, (F. C.); Porter, Dec. 11, 1816, (F. C.); 1. Holt, 297; Yallop, 15 Vessey, 66; Speldt, 13 Vesey, 589; Battersby, 3 Mad. Rep. 110.

*Chargers Authorities.*—Abbot, 27; 1. Holt, 236 & 266; M'Nair, Dec. 2, 1808, (F. C.)

D. BROWN, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.  
Agents.

No. 597.

Mrs. M<sup>c</sup>ALLESTER, Pet<sup>r</sup>  
 TRUSTEES of GENERAL F<sup>r</sup>—*Moncreiff—Graham Bell*  
 —*Jeffrey—Jameson—A. Wood.*

July 5, 1822.

FIRST DIVISION.  
 S.

*Husband and V*  
 £200 of alimen<sup>t</sup>  
 instance an a<sup>d</sup>  
 against her  
 Court.  
 presented a bill of suspension of a charge  
 tested bond of caution, bearing to have  
 in the Bill-Chamber, which he alleged  
 The Lord Ordinary, after comparing the  
 with that attached to several promissory-  
 notes, which it was not denied were signed by the  
 responder, refused the bill. To this judgment the  
 Court adhered; and remitted the case for the consi-  
 deration of the Lord Advocate.\*

No. 598.

JOHNSTONE & LITTLE—CARNEGIE & SHEPHERD, W. S.—Agents

July 5, 1

FIRST D

No. 601.

CAMPBELL, CLARK, and COMPANY, Petitioners.—  
*Forsyth—Jeffrey.*  
 HARLEY'S TRUSTEES, Respondents.—*Moncreiff—*  
*More—Hope.*

July 6, 1822.

FIRST DIVISION.  
 H.

*Interim Execution—Trustee.*—After final decree  
 had been pronounced against Harley's trustees, in  
 terms of certain conclusions against them personally,  
 they entered an appeal to the House of Lords. In-  
 terim execution was then demanded by Campbell,  
 Clark, and Company, which was opposed, on the  
 ground that, in the circumstances, it ought not to be  
 directed against them personally. But the Court at

\* A question as to the competency of the petition was raised;  
 but as it was at last passed from, it is unnecessary to notice it.

ed, in terms of the final decree, and

A. G. ELLIS, W. S.—Agents.

and Others, Petitioners.—*Grahame*.  
 and Others, Respondents.—*Hope*.

No. 602.

*Interim Execution*.—The case, No. 494, having been appealed, the petitioners prayed for interim execution as to the expences, and to allow the examination of the bankrupts to proceed in the meanwhile. The Court granted the first part of the prayer, on caution, in common form.

July 6, 1822.

FIRST DIVISION.  
 S.

W. & A. G. ELLIS, W. S.—G. NAPIER,—Agents.

W. H. LIZARS, Pursuer.—*Clerk—Cunninghame*.  
 W. LIZARS and Others, Defenders.—*Forsyth*.

No. 603.

*Process*.—The sole question here was, Whether the facts relative to an objection to a deed, on the head of deathbed, should be investigated by a proof on commission, or by a jury? The Lord Ordinary and the Court, in respect that there were points of law involved in the proof, ordered it to be taken by a commissioner.

July 6, 1822.

SECOND DIVISION.  
 Lord Kinnedder.  
 M'K.

J. STUART—W. FERGUSON, W. S.—Agents.

No. 600. E. PATERSON, Suspender.—*Moncreiff—Graham Bell.*  
J. ECCLES, Charger.—*Jeffrey—Jameson—A. Wood.*

July 5, 1822. Paterson presented a bill of suspension of a charge  
SECOND DIVISION. on a regularly tested bond of caution, bearing to have  
Bill-Chamber. been executed in the Bill-Chamber, which he alleged  
Lord Meadowbank. was forged. The Lord Ordinary, after comparing the  
M.K. subscription with that attached to several promissory-  
notes, which it was not denied were signed by the  
suspender, refused the bill. To this judgment the  
Court adhered; and remitted the case for the consi-  
deration of the Lord Advocate.\*

JOHNSTONE & LITTLE—CARNEGIE & SHEPHERD, W. S.—Agents.

No. 601. CAMPBELL, CLARK, and COMPANY, Petitioners.—  
*Forsyth—Jeffrey.*  
HARLEY'S TRUSTEES, Respondents.—*Moncreiff—*  
*More—Hope.*

July 6, 1822. *Interim Execution—Trustee.*—After final decree  
FIRST DIVISION. had been pronounced against Harley's trustees, in  
H. terms of certain conclusions against them personally,  
they entered an appeal to the House of Lords. In-  
terim execution was then demanded by Campbell,  
Clark, and Company, which was opposed, on the  
ground that, in the circumstances, it ought not to be  
directed against them personally. But the Court al-

\* A question as to the competency of the petition was raised; but as it was at last passed from, it is unnecessary to notice it.

lowed it to proceed, in terms of the final decree, and in common form.

D. FISHER—W. & A. G. ELLIS, W. S.—Agents.

J. M'GAVIN and Others, Petitioners.—*Grahame.*

No. 602.

D. MATHIE and Others, Respondents.—*Hope.*

*Interim Execution.*—The case, No. 494, having been appealed, the petitioners prayed for interim execution as to the expences, and to allow the examination of the bankrupts to proceed in the meanwhile. The Court granted the first part of the prayer, on caution, in common form.

July 6, 1822.

FIRST DIVISION.  
S.

W. & A. G. ELLIS, W. S.—G. NAPIER,—Agents.

W. H. LIZARS, Pursuer.—*Clerk—Cunninghame.*

No. 603.

W. LIZARS and Others, Defenders.—*Forsyth.*

*Process.*—The sole question here was, Whether the facts relative to an objection to a deed, on the head of deathbed, should be investigated by a proof on commission, or by a jury? The Lord Ordinary and the Court, in respect that there were points of law involved in the proof, ordered it to be taken by a commissioner.

July 6, 1822.

SECOND DIVISION.  
Lord Kinnedder.  
M'K.

J. STUART—W. FERGUSON, W. S.—Agents.



No. 604.

A. LEIPER, Pursuer.—*Cunninghame*.W. COCHRAN, Defender.—*Forsyth—Moncreiff*.

July 9, 1822.

FIRST DIVISION.

Lords Gillies and  
Meadowbank.

S.

*Fraud—Homologation—Minor.*—On the marriage of William Cochran, senior, to E. Torrance, his father disposed to him, ‘ and the heir or heirs to be procreated’ of the marriage, the lands of Craig. They had only one child, a daughter, who married A. Leiper, by whom she had a son (the pursuer) and a daughter. After the death of E. Torrance, Cochran entered into a second marriage, by which he had a son, the defender. The father and mother of the pursuer having died, leaving both him and his sister minors, curators were named to them. A submission was then executed between Cochran and the minors and their curators, by which they renounced all right to the lands of Craig, in consideration of a price to be fixed by the arbiters. Two deeds of a similar import had previously proved ineffectual; but at last a decree-arbitral was obtained, awarding a small sum. On the pursuer arriving at majority, Cochran got from him a ratification of the decree-arbitral, and a discharge of his rights; and afterwards conveyed the lands to the defender. At the distance of about thirty years, (during which time the pursuer had been serving as a soldier), he brought a reduction of these deeds, on the head, inter alia, of fraud and circumvention on the part of Cochran. In defence, it was denied that there had been fraud; and it was maintained, that, at all events, the proceedings were homologated by the deed of ratification, and by the lapse of time, without objection. But the Lord Ordinary decerned in the reduction, in respect ‘ that the

‘ submission and decree-arbitral in question, taken in  
 ‘ connection with the terms of the previous submis-  
 ‘ sions entered into betwixt the same parties, contain,  
 ‘ in gremio, proofs of fraud and imposition; and that  
 ‘ the subsequent deed, by which the said submission  
 ‘ and decree-arbitral are said to have been ratified,  
 ‘ cannot be effectual.’ To this judgment the Court  
 adhered.

*Pursuer's Authorities.*—Ogilvie, Jan. 26, 1694, (5652); Thomson, July 3,  
 1781, (8985).

*Defender's Authorities.*—1. Ersk. vii, 17 & 35; Glentoris, March 4, 1543,  
 (8978); Grundiston, March 6, 1561, (8978); Hamilton, Feb. 2, 1630,  
 (8981); Thomson, Dec. 13, 1666, (8982); Clerk, Dec. 6, 1699, (8688);  
 1. Ersk. vii, 39; Rig. Dec. 17, 1776, (5672).

J. TWEEDIE, W. S.—R. BOOG,—Agents.

P. DUDGEON, Petitioner.—*Cranstoun—Moncreiff—*  
*T. H. Miller.*

No. 605.

A. DUDGEON, Respondent.—*Jeffrey—Skene.*

*Curator Bonis*—A. S. Feb. 13, 1730.—This was  
 an application for appointment of a curator bonis to  
 the respondent, under the A. S. Feb. 13, 1730, so far  
 as related to persons ‘ who are under some incapacity  
 ‘ for the time to manage their own estates.’ But  
 the Court being of opinion that, in the circumstances,  
 they were not called on to name a curator, refused  
 the petition.

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FIRST DIVISION.  
 D.

D. M. BLACK, W. S.—T. SYME, W. S.—Agents.

No. 606. J. M'NAIR and TRUSTEE, Petitioners.—*Jameson.*

July 9, 1822.

FIRST DIVISION.  
D.

*Bankrupt.*—An offer of composition having been made by M'Nair, a bankrupt under sequestration, to his creditors, who had entertained it, a meeting was called for the 18th July, to decide on it; and the Court, on a petition, remitted to the Lord Ordinary on the Bills to approve of the composition, if he should see fit, and to exoner the trustee, and discharge the bankrupt.

*Petitioner's Authorities.*—Scott and Others, July 11, 1815; W. Lothian, July 1816.

H. GRAHAM, W. S.—Agent.

No. 607. D. M'LEOD, Petitioner.—*Moncreiff*—*Matheson.*  
H. ROSE, Respondent.—*Greenshields.*

July 9, 1822.

SECOND DIVISION.  
M'K.

*Interim Execution.*—In this case, the Court had assoilzied M'Leod, and found him entitled to expences; and remitted the account, when lodged, to the auditor of the Court to be taxed. Rose, at this stage, appealed to the House of Lords; and M'Leod, having prayed interim execution, it was objected to as incompetent. But the Court granted the prayer.

*Respondent's Authorities.*—Moffat, July 7, 1813, (F. C.); Brodie, Nov. 22, 1814, (F. C.); Gordon, July 11, 1821, (No. 155); Brown, Dec. 21, 1821, (No. 264).

INGLIS & WEIR, W. S.—D. HORNE, W. S.—Agents.

lowed it to proceed, in terms of the final decree, and in common form.

D. FISHER—W. & A. G. ELLIS, W. S.—Agents.

J. M'GAVIN and Others, Petitioners.—*Grahame.*

No. 602.

D. MATHIE and Others, Respondents.—*Hope.*

*Interim Execution.*—The case, No. 494, having been appealed, the petitioners prayed for interim execution as to the expences, and to allow the examination of the bankrupts to proceed in the meanwhile. The Court granted the first part of the prayer, on caution, in common form.

July 6, 1822.

FIRST DIVISION.  
S.

W. & A. G. ELLIS, W. S.—G. NAPIER,—Agents.

W. H. LIZARS, Pursuer.—*Clerk—Cunninghame.*

No. 603.

W. LIZARS and Others, Defenders.—*Forsyth.*

*Process.*—The sole question here was, Whether the facts relative to an objection to a deed, on the head of deathbed, should be investigated by a proof on commission, or by a jury? The Lord Ordinary and the Court, in respect that there were points of law involved in the proof, ordered it to be taken by a commissioner.

July 6, 1822.

SECOND DIVISION.  
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J. STUART—W. FERGUSON, W. S.—Agents.

had incurred large arrears as tacksman of a toll, had purchased heritable property in name of his son, a lad of eighteen years of age, and which he declined to give up to his creditors.

J. TAYLOR—N. GRANT,—Agents.

No. 611. CREDITORS of the BURGH of AUCHTERMUCHTY, Petitioners.—*Cockburn—Marshall.*

T. ADAMSON and Others, Respondents.—*A. Murray.*

July 10, 1822.

FIRST DIVISION.

D.

*Bankrupt.*—Decree sequestrating the estate and property belonging to the burgh of Auchtermuchty, which had become insolvent, and nominating a judicial factor, with the usual powers.

G. VEITCH, W. S.—THOMSON & FERGUSSON, W. S.—Agents.

No. 612. J. WATT, Suspender.—*Moncreiff—Macgachen.*  
BELL and BALFOUR, Chargers.—*Clephane.*

July 10, 1822.

FIRST DIVISION.

Lord Meadowbank.

D.

*Landlord and Tenant—Violent Profits.*—Bell and Balfour obtained decree of removing on the 2d September 1819, and warrant of ejection on the 20th, against Watt, a yearly tenant of a granary belonging to them. The warrant was not executed; and Watt continued in possession for a year longer. Bell and Balfour then raised action against him for double rent, as violent profits; and the inferior court decerned in terms of the libel, ‘ in respect that the defender has kept possession of the premises in face of a ‘ decree of removing and of letters of ejection; and, ‘ therefore, is liable in the violent profits; and that ‘ double the rent is not too high a sum, under the

' circumstances of the case.' In a suspension, the Lord Ordinary suspended the letters, ' in respect ' it is not averred by the chargers that any demand ' was made for possession of the granary after the ' warrant of ejection in 1819, previous to bringing ' the action for violent profits.' But the Court altered this interlocutor, and found the letters orderly proceeded.

*Suspender's Authorities.*—Stair, 397; 2. Bankt. 117; Ersk. 277; Stair, 307; M'Intosh, Feb. 1, 1798, (No. 5. Ap. Tack).

*Chargers Authorities.*—Weddell, Nov. 16, 1811, (18460); 2. Ersk. vi, 24; Grierson, Nov. 17, 1812, (F. C.)

CAMPBELL & MACK, W. S.—W. WALKER, W. S.—Agents.

E. BAILLIE, Pursuer.—*Matheson*.  
LADY SALTOUN, Defender.—*Gillies*.

No. 613.

*Expences*—The case, No. 262, having been remitted to the Lord Ordinary to hear parties as to expences, his Lordship found the pursuer entitled to them; and the Court adhered.

July 10, 1822.

SECOND DIVISION.  
Lord Pitmilley.  
F.

T. M'KENZIE—J. B. FRASER,—Agents.

J. SOMMERVILLE, Suspender.—*Jameson*.  
D. M'KENZIE, Charger.—

No. 614.

*Expences*—In a process of suspension and liberation at the instance of Sommerville, on the ground that he had been incarcerated on a debt which had been paid, the Lord Ordinary suspended the letters, and granted warrant of liberation; but, in the circumstances, found only modified expences due. Som-

July 10, 1822.

SECOND DIVISION.  
Lord Pitmilley.  
F.

merville having reclaimed, the Court (in absence) altered, and found him entitled to full expences.

MACK & WOTHERSPOON, W. S.—J. G. HOPKIRK, W. S.—Agents.

No. 615.

F. SNODGRASS, Pursuer.—*Ro. Bell.*  
His CREDITORS, Defenders.—

July 10, 1822. *Cessio Bonorum.*—Snodgrass was imprisoned on a  
SECOND DIVISION. debt of £10, which was entered in the jail-books at  
£1. On the day of his incarceration, he was, with  
consent of the creditor, liberated on a sick-bill; and,  
on the lapse of a month, he applied for the benefit of  
the cessio. The Court, after ordering new and special  
intimation to the creditors, and no opposition being  
made, decerned in his favour.

F. SNODGRASS, W. S.—Agent.

No. 616. MRS. JOHNSTONE and Others, Petitioners.—*Fullerton.*  
J. WILSON, Respondent.—*Gillies.*

July 11, 1822. *Factor loco Tutoris—Parent and Child.*—The  
FIRST DIVISION. children of Wilson had right to the fee of certain  
H. subjects on the death of a liferentrix, who was ar-  
rived at an advanced age; and as he was an undis-  
charged bankrupt, without any settled domicil, the  
nearest relations of the children presented a petition  
to the Court for the appointment of a factor loco  
tutoris and curator bonis, which was granted.

J. ORR—W. SMITH,—Agents.

C. AITKEN, Suspender.—*J. Henderson, jun.*

No. 617.

E. NEILL, Charger.—*D. Dickson.*

*Semiplena Probatio.—Proof.*—Neill having obtained decree against Aitken for aliment, as the father of her natural child, on a semiplena probatio, supported by her oath in supplement, he suspended, alleging that the proof was not sufficient. But the Lord Ordinary repelled the reasons, in respect 'it has been proved by two witnesses, that the suspender, a grocer, was seen standing with the pursuer, a collier girl, at the back of Tranent, at 12 o'clock at night; and that he was seen by another person walking with the pursuer after it was dark.' And his Lordship refused a representation farther, in respect that the other evidence 'shewed a familiarity at a later period, by the representer having given the respondent gingerbread, which could hardly have existed betwixt persons in their different situations in life, without being corroborative of what is sworn to by the other witnesses, as to what had taken place about nine months before the child was born; and the Court adhered.

July 11, 1822.

FIRST DIVISION.  
Lord Alloway.  
H.

*Suspender's Authorities.*—Hunter, Jan. 15, 1811, (F. C.); Bowie, Dec. 1, 1808, (F. C.); Craig, June 14, 1809, (F. C.)

J. MALCOLM—J. PATERSON,—Agents.

J. M'CRACKEN, Petitioner.—*Gillies.*

No. 618.

R. BROWN, Respondent.—*Fergusson—More.*

*Bankrupt.*—M'Cracken having applied for sequestration of his estates, under the bankrupt act, as a

July 11, 1822.

FIRST DIVISION.  
S.



merchant, broker, and ship-owner in Scotland, he was opposed by Brown, who denied that he had ever been a merchant, except in Ireland. But the Court being satisfied that he was a ship-owner, and had been engaged in fishing adventures in Scotland, awarded sequestration.

W. GUTHRIE—J. GEMMEL,—Agents.

No. 619.

W. GLASS, Suspender.—*Ro. Bell*,  
G. WILSON, Charger.—*Borthwick*.

July 11, 1822.

SECOND DIVISION.  
Bill-Chamber.  
Lord Kinnedder.  
B.

*Usury*.—Glass presented a bill of suspension of a charge given him to pay a bill accepted by him, alleging that it had been granted for an usurious transaction. But, as his allegations were not sufficiently specific, the Lord Ordinary and the Court refused it.

*Suspender's Authorities*.—Chity, 76; Glen, 88.

F. SNODGRASS, W. S.—GREIG & PEDDIE, W. S.—Agents.

No. 620.

C. FERRIER, Petitioner.—*Forsyth*.  
J. BERRY and Others, Respondents.—

July 11, 1822.

SECOND DIVISION.  
F.

*Process*.—In a process of proving the tenor, the Court had allowed a proof in common form; and Ferrier having presented a petition for a commission to take the deposition of 'some of the witnesses,' who 'have an intention immediately to go abroad,' the Court refused it, as his reasons were too vague.

J. SWAN, W. S.—MACMILLAN & GRANT, W. S.—Agents.

J. CROMARTY and his FACTOR loco Tutoris, Petitioners.—*Bell.* No. 621.

*Ranking and Sale.—Tutor and Pupil.*—Cromarty, July 11, 1822.  
a pupil, having, as heir-apparent of his father, raised, SECOND DIVISION,  
along with his factor loco tutoris, actions of ranking F,  
and sale, and of cognition and sale, of certain lands in  
Orkney, which were estimated by him at about  
£1,500, applied to the Court for a commission to  
take a proof of the value in Orkney, instead of in  
Edinburgh. But the Court refused the petition.

*Petitioners Authorities.*—Earl of Merton, Dec. 9, 1748, (13316); Mitchell,  
June 12, 1667, (12098); Riddell, Nov. 11, 1716, (16350); Pollock, Jan.  
13, 1747, (16351); Creech, Feb. 24, 1796.

A. DALLAS, W. S.—Agent,

T. HARVIE, Claimant,—*Moncreiff—D, M'Farlane,* No. 622.  
R. PLAYFAIR, (M'KENZIE's Trustee), Respondent.—  
*Bell—Maconochie.*

*Bankrupt.*—Harvie, as assignee of Primrose, claim, July 11, 1822.  
ed to be ranked on the sequestrated estate of M'Ken- SECOND DIVISION,  
zie, which the trustee refused, in respect,—1. That Bill-Chamber.  
prior to the assignation, Primrose's claim had been Lord Meadowbank,  
rejected, of which due notice was given, and that no F.  
objections had been made within thirty days; and,  
2. That Primrose had fraudulently appropriated to  
himself a sum greater than his claim, which he had  
been employed to recover for the estate; and that  
Harvie, as his assignee, could not demand payment.  
The Lord Ordinary repelled the claim on the first of

the above reasons ; but the Court, considering it inapplicable to the circumstances of the case, adhered, in respect of the second.

J. PATISON, W. S.—R. PLAYFAIR,—Agents.

**No. 628.**      **ROBERTSON and COMPANY, Suspenders.—***Mare.*  
**T. ROUTLEDGE and MANDATORY, Chargers.—***Jame-*  
*son.*

**July 11, 1822.**      *Bill of Exchange—Proof—Stamp.*—Robertson and  
**SECOND DIVISION.** Company accepted a bill, dated Hamburg, drawn on  
**Lord Kinnedder.** them by Elliot, Page, and Company, merchants there.  
**B.** Having been charged on it by Routledge, an indorsee, they presented a bill of suspension, stating that the bill had been drawn in London, (which they offered to prove); that it was not stamped; and that, as arrestments had been used in their hands by creditors of Elliot, Page, and Company, who were now bankrupt, they were not in safety to pay. The Lord Ordinary refused the bill, in respect ‘ that Elliot, ‘ Page, and Company, merchants in Hamburg, having made consignments to the suspenders, were authorized by the latter to draw bills for the price: ‘ that the bill charged on was duly accepted by the ‘ suspenders, as part of the value of the goods transmitted to them; and that it is now held by the ‘ chargers, as bona fide onerous indorsees; and that ‘ this bill, being dated at Hamburg, and being ‘ drawn by a mercantile company established there, ‘ must be regarded as a foreign bill of exchange, to ‘ which the provisions of the British stamp-acts do ‘ not apply.’ But the Court altered this interlocu-

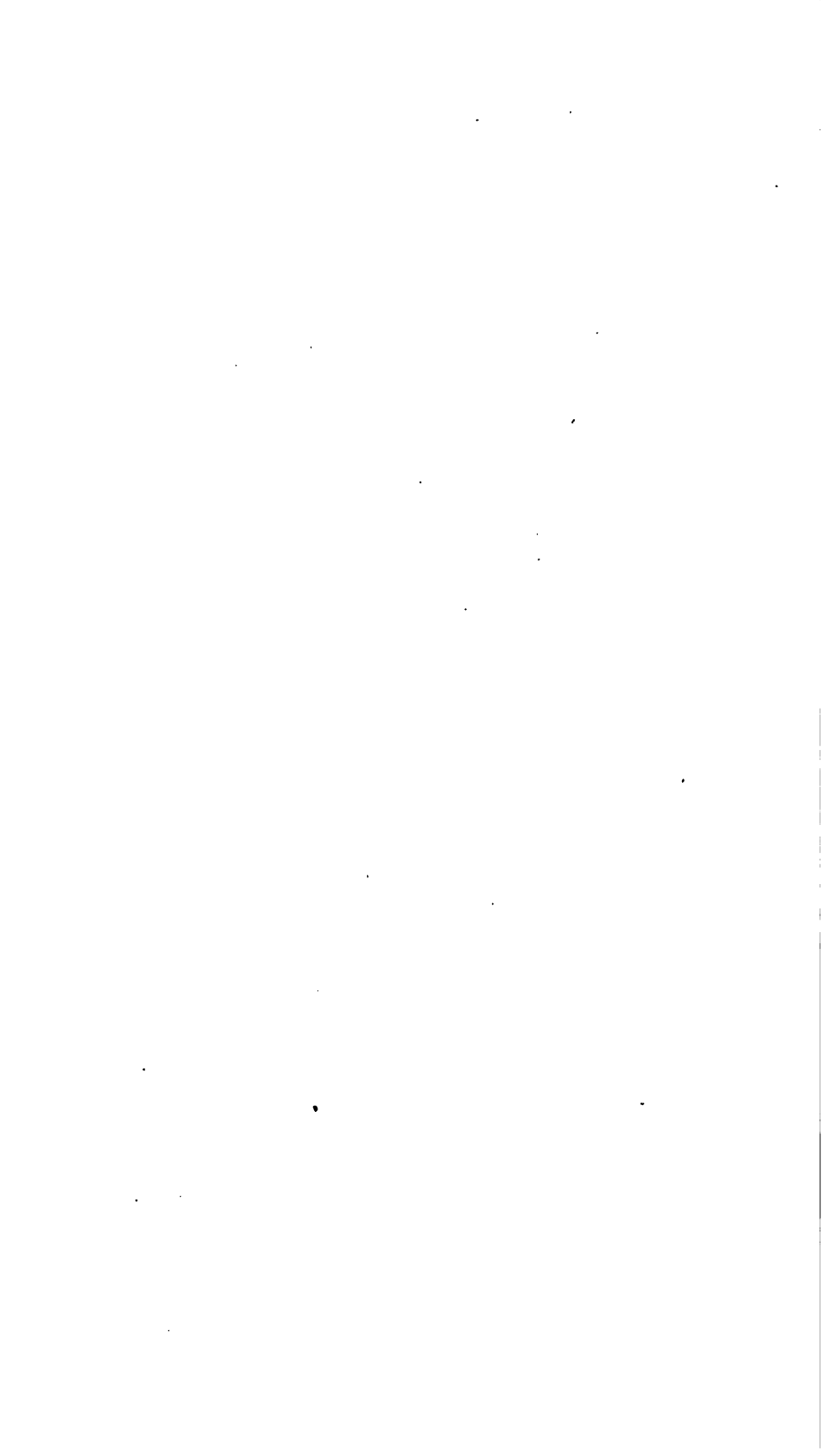
tor, and remitted to his Lordship to pass the bill, on caution.

*Suspensory Authorities.*—Chitty, 70 & 528; Jordaine, 7. T. R. 601.

*Chargers Authorities.*—Walton, 1. T. R. 300; Abraham, 4. Camp. 208.

J. ROBERTSON, W. S.—T. JOHNSTONE,—Agents:





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END OF THE FIRST VOLUME.

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EDINBURGH :

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DECISIONS  
OF THE  
COURT OF JUSTICIARY,  
FROM  
1819.

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HIGH COURT OF JUSTICIARY.

GEORGE CAMPBELL.—*Alexander.*

No. 1.

*Attempt to Violate Sepulchres.*—George Campbell and others were accused, in the major proposition, of “the violating, or attempting to violate, the sepulchres of the dead, and the attempting to raise and carry away dead bodies out of their graves, by digging earth from the said graves; as also, the feloniously removing earth from graves, with the intent of raising and carrying away the dead bodies therein interred.” An objection having been stated to the relevancy, the Lords—“find, that the charge of attempting to violate the sepulchres of the dead, in the manner stated in this indictment, is a relevant charge; and,

June 21, 1819.

therefore, find the same relevant to infer the pains of law."

No. 2.

WILLIAM MONTEATH.—*Jeffrey—Monteath.*

July 12, 1819.

*Theft—Reset of Theft—Habite and Repute a Resetter.*—William Monteath was indicted for " theft, particularly sheep-stealing, especially when committed by a person habite and repute a thief; as also, reset of theft, especially when committed by a person habite and repute a resetter of stolen goods." The indictment then, in the usual form, accused the pannel of having stolen a ewe, and of being habite and repute a thief: or of having resetted it, knowing it to be stolen, and of being habite and repute a resetter of stolen goods, knowing them to be stolen. An objection having been made to the relevancy, the Court, " having considered the indictment against William Monteath, pannel, and heard parties procurators thereupon, ordain them to give in informations upon the relevancy of the said indictment." \*

No. 3.

GEORGE SMYTH.—*M'Neill.*

July 20, 1819.

*Indecent Practices.*—George Smyth was indicted for the " crimes of assaulting young girls, and using lewd, indecent, and libidinous practices and behaviour towards them; as also, the feloniously and publicly exposing the private parts of the body in a shameless and indecent manner." The Lords, " having considered the indictment against George Smyth, pannel, they find the same relevant on both charges."

\* No farther notice is taken of this case in the record.

The pannel was found guilty in terms of his own confession, and was sentenced to seven years transportation.

GILBERT M'LEOD and W. CARSE.—*Cockburn.*

No. 4.

*Contempt of Court—Summary Conviction.*—"The Lord Advocate represented, that in a periodical paper published at Glasgow, dated the 25th of December 1819, entitled, "The Spirit of the Union," and of which he now produced a copy, an article, of which the following is an extract, had been inserted, containing a commentary on the proceedings which took place before the High Court of Justiciary on occasion of that Court pronouncing sentence of fugitation against George Kinloch of Kinloch, Esquire, on the 22d ult.

Jan. 3, 1820.

"G. Kinloch, Esquire, our readers will have ere this time learned, did not answer, at the diet appointed for his trial, the charge of having uttered seditious expressions at a meeting of the friends of radical reform in Dundee in November last. Sentence of outlawry has been, accordingly, pronounced against him, his bail-bond for the appearance forfeited, and all his moveable goods and gear escheat for his Majesty's use."—"The report of the proceedings stated, that the Lord Justice-Clerk, after directing the Solicitor-General to use all diligence to bring Mr. Kinloch to justice, said, that it would be in order to answer for the dangerous and inflammatory matter he had disseminated among the lower orders of the people." After stating sundry observations applicable to the charges against Mr. Kinloch, said paper pro-



ceeds thus.—“The Glasgow Courier, we understand, said on Thursday, that if such and such forfeitures could be rigorously exacted by the Crown, then Mr. Kinloch would have paid pretty well for his speech to the radicals; and certainly if Mr. Kinloch had continued to be an enthusiastic admirer of government like them, and had been on every needful occasion reprobating and blackguarding the people, and denying that they had any right at all, if their rulers choose to say so, all would have been well, and Mr. Kinloch would not have had the smallest occasion to flee from the power ready to inflict upon him an ignominious punishment—not ignominious considering the character of those who were *prepared* to inflict it. With their speeches addressed to a jury who had not seen a morsel of evidence, with all the unchecked velocity, and heaping up of odious epithet above odious epithet, of a rising crown lawyer. We certainly never read any thing with more disgust and alarm for the character of the Scottish Bench than the uncalled for, the unwarrantable liberties taken by the Lord Justice-Clerk with the juries of Kinloch and Shiels, the vendor of the Black Dwarf and Carlile’s Republican. We expected that the sacred regard for the situation of a jurymen, which we have seen him evince in other cases, would have prevented him from lending the weight of the Bench to the bare, unchallenged, unauthenticated surmises of a crown lawyer, in proof of whose charges not a witness had been called, and not a word heard in extenuation. God knows there is enough of prejudice already in the Lothians against reformers of every sort; and what an addition must this speech make to it? Every subsequent jurymen on a similar trial cannot fail to enter

the inclosure with the weight of this dignified opinion. Every witness that turns up cannot but be viewed through its dazzling medium. He cannot be listened to by the jury with exclusive attention to what he says, and comparison of it made with the charges in the indictment. The Lord Justice-Clerk's opinion of such men, and such opinions so expressed, will be continually obtruding itself, and will leave ordinary minds little to do but accommodate every thing to it that may transpire during a trial for sedition." That this statement was not only untrue, but was calculated to lessen the respect which the people of Scotland owe to the Supreme Criminal Court of the country : that considering this matter as constituting a gross contempt, and as offering a high indignity to this judicature, he felt it peculiarly his duty to call their Lordships attention to it ; and as he had good reason to know and believe that George\* M'Leod, printer, residing 15, George Street, Glasgow, and William Carse, printer, residing 151, Salt-Market Street there, the printing office of both of whom is situated at 127, Trongate Street, Glasgow, are two of the partners of G. M'Leod and Co. mentioned in said paper as the printers thereof, he submitted, that, agreeably to the practice observed in similar cases, their Lordships should immediately issue the necessary warrant for causing these parties to appear at this bar to answer to the foregoing charge, which concerned not only the respectability, authority, and usefulness of this High Court, but, as inseparable from these, the general interests of the country at large."

\* This was a misnomer, afterwards corrected, his name being Gilbert.

A warrant was, accordingly, issued.

On the 12th of January M'Leod and Carse were examined in presence of the Court; and on the 18th, the Court being about to take into consideration the declarations emitted by M'Leod and Carse, "Mr. Henry Cockburn, advocate, as counsel for the said Gilbert M'Leod and William Carse, objected to the summary course of proceeding under which punishment was now craved, upon the two following grounds.—

"1st, The publication in question did not take place till after the fugitation of Mr. Kinloch; and there was, therefore, no proceeding legally depending before the Court which the publication could directly disturb. In this situation, the prisoners, whatever their guilt may be, are entitled to the benefit of a regular trial as a matter of absolute right, and there is no precedent for depriving them of it. In the case of Campbell, 24th February 1678, the offence was committed *in the Court during a trial*. In the case of Nairne and Ogilvie in 1765, though sentence had been pronounced, it was not decidedly held at the time that the proceedings were finished. An appeal had been tendered to the House of Lords, and, in those days, it was not certain that such an appeal was incompetent. It is, moreover, expressly stated in the complaint by the Lord Advocate, that the proceedings were still under the consideration of his Majesty in council. In the case of Johnstone and Drummond, 1793, no regular trial was demanded.

"2dly, Even although it should be held that this summary proceeding was competent, still it is not absolutely necessary; and so long as a regular trial can be granted, it ought to be allowed."

The Court declined hearing his Majesty's Advocate in reply, and pronounced this judgment.—  
“ Having considered the foregoing objection to the competency of this Court proceeding to judge of this matter in the present summary manner, repel the said objection.”

The Lord Advocate thereafter stated, that he withdrew his representation against Carse, leaving it to the Court to pronounce such censure as, in the circumstances, it might be deemed proper to inflict. And thereafter, the Court “ having considered the newspaper, entitled, *The Spirit of the Union*, No. 9, of date Saturday, December 25, 1819; containing a commentary on the proceedings which took place at passing sentence of fugitation against George Kinloch of Kinloch, with the representations made by his Majesty's Advocate thereanent, with the declaration emitted by the said Gilbert M'Leod, and heard Mr. Henry Cockburn, advocate, as his counsel, with what has this day been represented by his Majesty's Advocate respecting the said William Carse, and the declaration emitted by him, find, that the said publication is a false and slanderous representation of what passed in the Court at pronouncing sentence of fugitation against George Kinloch, and a gross indignity offered to this High Court, calculated to create groundless jealousies and doubts of the due administration of justice by the Supreme Criminal Court of this part of the United Kingdom: that the said Gilbert M'Leod, the publisher, printer, and the author of the article mentioned in the representation of the Lord Advocate, and the said William Carse, in whose office the said paper was printed, are guilty, art and part, of printing and publishing the said

false and slanderous representation." The Court sentenced M'Leod to be imprisoned in the jail of Glasgow for four months, and till he found caution under a penalty of £40 sterling for his good behaviour for three years. " But in the whole circumstances of this case, and of what has been represented by his Majesty's Advocate, the Court do not proceed to inflict any other punishment upon the said William Carse than to dismiss him from the bar, with a rebuke, which they appoint to be given him by the Lord Justice-Clerk."

No. 5.      GEORGE BEGRIE and Others.—*M'Neill—Burn*,

January 8, 1820.      *Witness—Agency*.—In the case of George Begrie and William Paterson, or Pattison, accused of theft, " M'Neill and Burn, for the pannels, objected to the admissibility of Dirom Bremner, on the ground of agency and partial counsel, in so far as he attended the precognition of the witnesses in this case; and, particularly, had precognosced George M'Cunan and Jean Carlyle or Johnstone, witnesses, who have been already examined."—" After the counsel for the pannels had examined the said Dirom Bremner in support of their objection, the Court pronounced the following interlocutor,—“ Having heard the examination of the said Dirom Bremner, find, that the inquiries made by him being in discharge of his duty as a police-officer, do not disqualify him from being a witness in causa; and, therefore, repel the objection,”

WILLIAM WATSON and A. MURRAY.—*M'Neill*.

No. 6.

*Contempt of Court—Summary Conviction.*—The diet February 18, 1820, being called in the case of Gilbert M'Leod, accused of sedition, "Cockburn, for the pannel, represented to the Court, that in the newspaper, entitled, "The Edinburgh Correspondent," of Monday the 14th February 1820, a paragraph had been published of the following tenor.—"This day the High Court of Justiciary met to try the case of Gilbert M'Leod and others from Glasgow, accused of sedition. The Court has taken up that of M'Leod first. The indictment charged him with various acts of a seditious nature, in what he has published in the paper called the "Spirit of the Union," of which he is editor; but particularly with one article of the 30th October, purporting to be an address to the citizens of Glasgow, the language of which is a disgrace to the country, though thoroughly adapted to corrupt the minds of the people. It attacks the public institutions in general, but it particularly dwells on the manner in which the taxes are collected, which, it is therein stated, are both unfairly done, and in a brutal way; and he advises the people to oppose force to force. It also attacks the Manchester authorities in the most uncourteous language. He is charged also with sedition at a public meeting." Which paragraph, he humbly submitted, was a gross contempt of Court, and highly injurious to the pannel, by giving a false and aggravated statement of the nature of the charges made against him in the libel, and by making his case, though under

judicial trial, a matter of public discussion, which, even although the statements had been correct, would have been improper. He, therefore, craved their Lordships to call William Watson, the editor or printer of that paper, to the bar, and to proceed against him, and against the person who shall be discovered to be the author of that paragraph, according to justice."

On the 28d February, Watson, the editor, and Alexander Murray, who inserted the article in the newspaper, were examined by the Court; both of whom expressed their contrition; and on the 28th, after M'Leod had withdrawn his complaint, the Court pronounced the following judgment.—"Find, that the printing, composing, and publishing the article respecting the trial of Gilbert M'Leod on the 14th current, while the said trial was in dependence before the Court, was calculated to prepossess the minds of the people, and of the jury and witnesses, with regard to the trial of the said Gilbert M'Leod: find, that such conduct is derogatory to the authority of this Court, dangerous to parties, whether prosecutors or pannels, and subversive of the principles of a fair trial: but in respect of the statement given in by the said William Watson, and of the candid confession of the above Alexander Murray, and that this misconduct appears to have proceeded from the hurry of the moment, and under a belief that the trial of Gilbert M'Leod was to proceed that day, without due attention to the consequences; therefore, the said Lords only fine and amerciate the said William Watson in the sum of £5 sterling; and farther, ordain him to be rebuked by the Lord Justice-Clerk from the chair."—"And the

said Lords adjudge the said Alexander Murray to be imprisoned in the jail of Edinburgh for the space of one month from this date."

GILBERT M'LEOD.—*Jeffrey—Moncreiff—Ivory.*

No. 7.

*Jurisdiction—Punishment.*—Gilbert M'Leod having been found guilty of sedition, by the publication of certain seditious articles in a newspaper called the Spirit of the Union, the following judgment was pronounced in reference to an objection taken by his counsel.—"The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered the verdict of assize returned against the said Gilbert M'Leod, pannel, on the 21st day of February last; and having heard parties procurators at great length upon the nature of the crime whereof the pannel has been found guilty, the extent of punishment competent to the Court to award in this case, and on the circumstances calculated to mitigate the pains of law, as applicable to the pannel, they repel the plea that this Court has not the power of pronouncing a sentence of transportation for the crime of which the pannel is found guilty." He was sentenced to be transported for five years. March 8, 1820.

PATRICK BRANAN and Others.—*M'Neill—Menzies.*

No 8.

*Indictment.—Specific Charge—Forgery.*—Patrick Branan and others were indicted, under four charges, for the crimes of "falsehood, fraud, and wilful imposition; as also, using or uttering, as genuine, false and forged writings, knowing them to be false and March 20, 1820.



forged ;” and the minor proposition accused them in these terms.—“ In so far as you, the said Patrick Branan, (&c.) having, by means of unlawful and felonious transactions to the prosecutor unknown, become possessed of a number of false papers, in imitation of the passes or certificates by which the wives and children of soldiers embarked for foreign service, or the wives, widows, or children of soldiers employed on foreign service, are entitled to draw certain allowances in money to enable them to return to their homes; and which false passes so obtained by you had each of them attached thereto a printed warrant, with the blanks filled up in manuscript, or otherwise prepared, and intended to pass for the said genuine passes or certificates, did, in the course of one or other of the months of December 1819, (&c.) fraudulently use or utter as genuine the said false and forged passes or certificates, knowing the same to be false and forged, and did thereby fraudulently obtain money from Alexander Simpson, schoolmaster and kirk-treasurer of the parish of Corstorphine, in the county of Edinburgh : and, in particular,—1. you, (&c.) did all and each, or one or other of you, upon the 17th day of January 1820, (&c.) at Corstorphine, in the parish and county aforesaid, fraudulently use or utter 24 or thereby of the said false and forged passes or certificates, by presenting the same to the said Alexander Simpson as genuine, you knowing them to be false and forged, and fraudulently claiming allowances, as due thereon, for 24 women and children, whom you falsely pretended were then travelling on the road to Glasgow, whereby you did cozen and impose upon the said Alexander Simpson, and did prevail on him to pay to

you, or one or other of you, and did defraud him of £4 : 4s. or thereby; or otherwise, you did then and there impose upon the said Alexander Simpson, and did prevail upon him to pay to you, or one or other of you, and did defraud him of the said sum of money, by presenting to him 24 papers or thereby, being, or pretending to be, the genuine passes or certificates above mentioned; and by falsely stating to him, that the persons therein described as entitled to the said allowances, were then travelling to Glasgow, and that you were employed to draw the money for them, although you knew you were not entitled to draw any money thereon." The indictment contained two other charges of the same tenor, as to a number of other passes, with a like alternative charge of fraud. On an objection by the counsel for the pannels, the Court " find, that the indictment, in so far as it charges the using or uttering false and forged passes or certificates, knowing them to be false and forged, as genuine, in the three first charges thereof, are not so specifically stated as to be sent to the knowledge of an assize: but find the charges of falsehood, fraud, and wilful imposition, contained in these three charges, and also the fourth charge of the indictment, relevant to infer the pains of law."

JAMES M'COUL, *alias* MOFFAT.—M'Neill—Menzies:

No. 9.

*Citation—Criminal Letters.*—James M'Coul, *alias* Moffat, was accused on criminal letters of theft, aggravated by housebreaking. June 12, 1820.

The will of the criminal letters was, " that on sight hereof ye pass, and in our name and authority

command and charge the said James M'Coul, *alias* Moffat, *alias* Martin, *alias* Wilson, to compear before our said Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, in a Court of Justiciary to be holden by them within the criminal court-house of Edinburgh, upon the said 12th day of June, in the hour of cause, (10 o'clock forenoon), there to underlie the law for the crime above specified, and that under the pains contained in the acts of parliament." The execution of citation was exactly in the same terms ; and in the conclusion it stated, that " the said copy of charge was also signed by me, and did bear the date hereof, date and signetting of said criminal letters, and contained the names and designations of James Waldie and Peter Buncle, both turnkeys in the jail of Edinburgh. JOHN MORRISON. *James Waldie*, Witness. *Peter Buncle*, Witness."

" Menzies and M'Neill, for the pannel, objected, that he could not be called on to plead to the criminal letters, in respect he was not legally cited to appear. For, in the *first* place, the execution of citation against him does not bear that the persons who signed it as witnesses, and whose names and designations are inserted in it, were " witnesses to the premises, and hereto subscribing ;" consequently, the execution does not bear, as it ought to have done, and as executions in criminalibus invariably do, that the citation was given in presence of two witnesses. The messenger does not assert that this indispensable solemnity was duly performed ; and although the word witness is attached to the subscription of two persons who subscribed along with the messenger, they do not assert that they were present at the pre-

mises, and the presumption is that they merely attest the messenger's subscription. There is thus no proof that the citation was given in the manner the law requires, and it is, therefore, null. 1587, c. 86; *Lothian's Form of Proces*; *Hume*, vol. ii, 253.

" 2. The libel to which the pannel is now called to plead is in the form of criminal letters, but the citation which he has received is not applicable to that form of libel. The only competent form of citation on criminal letters, whether for offences, bailable or not bailable, is for the person accused to come and find caution for his appearance to underlie the law on a day named. But, in this case, the pannel has been cited merely to appear to underlie the law,—a form of citation which is applicable to indictments only. There is no instance of a similar citation on criminal letters, unless, perhaps, where the party was already in custody on a criminal warrant for the same crime: but, in the present case, the pannel had obtained his liberation under the act 1701, and had since been incarcerated for debt only." *Hume*, ii, 149, 150, 152; *Lothian's Form of Process*.

" *M'Kenzie*, *Drummond*, and *Mr. Solicitor-General* answered,—1. That no statute requires that the execution shall state that there have been witnesses to the premises; and that it appears sufficiently from the execution that there were witnesses to the premises, as they sign every page of the execution, and add witnesses to their names; and being there as witnesses, it must be presumed that they were present as witnesses to the premises, that being what the law requires them to witness, and not the subscription of the messenger, which no law requires. The decisions in the civil court seem to have set this

question at rest, even in the case of probative writs under the statute 1681 ; whereas the execution of the criminal letters is not a probative writ, nor liable to the same strict technical construction. *Napier v. Lord Elphinstone*, 8th December 1736. *Doig v. Kerr*, January 1741. *Paterson v. Thomson*, January 16, 1784 ; and the late case, *Hay v. Wemyss*, not yet reported.\*

“ 2. The execution and citation are conformable to the will of the letters. It would have been absurd to summon a person to find caution on a capital charge, where bail would not have been received, and who was actually in custody at the time for debt, and about to be imprisoned for the theft libelled immediately upon service of the letters. No practice could justify so unnecessary a form ; and, in fact, the distinction founded on between indictments and criminal letters has not been observed by the clerk of Court, and this with the knowledge and approbation of the Court.”

The Court, after hearing parties, adjourned till the next day, (18th June), when they pronounced this interlocutor.—“ Having considered the objections stated in bar of trial at last sederunt, repel the said objections, and allow the trial to proceed.”

No. 10. DAVID HAGGART and W. FORREST.—*Maitland—H. J. Robertson.*

July 12, 1820. *Verdict.*—David Haggart and William Forrest were indicted for the crimes of “ theft ; as also, housebreaking, with intent to steal : as also, theft,

\* See Notes of the Cases, &c., No. 56.

aggravated by housebreaking : as also, prison-breaking : as also, reset of theft." The pannels pleaded guilty : and the prosecutor thereafter led a proof by witnesses. The jury returned the following written verdict.—" Having considered the criminal indictment raised and pursued at the instance of his Majesty's Advocate, for his Majesty's interest, against David Haggart and William Forrest, pannels, the interlocutor of relevancy pronounced thereon by the Court, with the judicial confession of the pannels, and other evidence adduced in proof of the indictment, unanimously find the pannels guilty of theft, but not of reset of theft : but, by a majority of voices, find the charge of housebreaking not proven. In witness whereof," &c.

" Maitland, for the pannels, objected, that no sentence could follow upon the said verdict, in respect of its want of application to the indictment, and prayed the Court to allow them farther time to state their objections in writing."

The Court ordered informations. Haggart thereafter escaped ; and, on the 5th of April 1821, the Court, after awarding sentence of outlawry against him, pronounced this judgment.—" Having considered the verdict returned against the said William Forrest, pannel, on the 12th day of July last, with the informations for the parties, given in, in obedience to the order of Court, of that date, repel the objections stated in arrest of judgment."

No. 11.     DAVID BEATSON and JOHN M'PHERSON.—*Jo. Henderson, junior.*

July 17, 1820.     *Verdict.*—David Beatson and John M'Pherson were indicted for theft, aggravated by being habit and repute thieves. The verdict was in these terms.—“ The jury find that David Beatson, in terms of his own confession, is guilty of the theft libelled, but that it is not proven he is habit and repute a thief: that John M'Pherson is guilty of being habit and repute a thief, but that it is not proven he was guilty of the particular act of theft libelled in the indictment.”

The Court, “ having considered the verdict of assize returned in this case, find, that no punishment can follow upon the said verdict against the pannel, John M'Pherson; and, therefore, assoilzie him simpliciter, and dismiss him from the bar.”

No. 12.     ADAM TAYLOR and Others.—*Watson.*

Aug. 20, 1820.     *Citation.*—Adam Taylor and others were indicted for theft and reset of theft. The “ counsel for the pannels objected, that they had not been legally cited to appear, inasmuch as the pannels doubles, or copies of the criminal letters, had not been signed on each page by the messenger who executed them; neither had that officer, in his copy of citation annexed thereto, mentioned the number of pages of which those copies consisted, in terms of the act of adjournal, 12th July 1803; and as the present trial was on new criminal letters, the pannels were en-

titled to have the diet deserted simpliciter, conform to act of parliament 1701, cap. 6."

The Court "having considered the foregoing objection, they sustain the said objection, desert the diet against the pannels simpliciter, and dismiss them from the bar."

JOHN SHARP.—*Keay—Maitland—H. J. Robertson.*

No. 13.

*Verdict.—Trial.*—John Sharp had received sentence of death on the 14th July 1820, for theft by housebreaking; and at the sederunt of this day a remission of that sentence was produced in his favour. Aug, 28, 1820.

"Whereupon his Majesty's Advocate represented, that the person now at the bar in whose favour the foregoing remission had been granted, was also tried before their Lordships on the 14th day of July last, for the crime of shooting at and wounding one of the patrol-men of the county of Lanark, and a verdict was returned, finding him guilty, which being read, his Lordship stated, that he had reason to believe that one of the jurymen, namely, Charles Tait, bookseller in Edinburgh, was a minor when the verdict which had now been read was pronounced: that upon the principle of the decision of the High Court in the case of Menzies in the year 1790, this circumstance, he conceived, rendered the said verdict, and the whole proceedings on which it was founded, entirely void, so that no sentence could competently follow thereon: that as it is of importance to the public interest that this objection should be disposed of, so as no obstacles may arise to any farther proceedings which the Crown may be advised to adopt against the pri-



soner, he was now ready to adduce evidence of the fact above stated, agreeably to the proceedings in the foresaid case of Menzies."

The Court adjourned till the 20th November, when a proof was taken; and on the 27th "his Majesty's Advocate moved, that the Court do now resume consideration of the evidence led at last diet, and find, that, in respect one of the assize was a minor, the verdict, and whole previous procedure on the trial of the pannel, John Sharp, for maliciously discharging loaded fire-arms at the lieges, and wounding them to the effusion of their blood, and imminent danger of their lives, are null and void; and that the pannel may be again brought to trial before this Court for the said offence; and, to that effect, he prayed the Court to grant warrant to commit the pannel to prison until liberated in due course of law."

"Parties procurators having been heard at considerable length," the Court again adjourned till the 4th December, when informations were ordered; and, on the 5th March 1821, the Court pronounced this judgment.—"Having considered the proceedings in the sederunt of 20th August last, with the evidence adduced on the 20th November last; motion by his Majesty's Advocate on the 27th November, with the informations given in for the parties in obedience to the order of Court, dated 4th December last, and before recorded, find it established, that Charles Tait, one of the persons who passed upon the assize of the pannel at his trial for shooting at and wounding one of the patrol-men of Lanarkshire, was, at the date of said trial, under twenty-one years of age; and, therefore, that the verdict returned in said trial, and whole previous procedure, are null and

void; and that no judgment can follow thereon against the pannel; but find, that the said John Sharp may still be subjected to trial for the said crime; and, therefore, grant warrant to macers of Court to apprehend his person, and to commit him a prisoner to the jail of Edinburgh, therein to be detained till liberated in due course of law."

FRANCIS ADAMS.—*Whigham.*

No. 14.

*Forgery—Uttering by Delivery to Agent.*—Francis Adams was indicted for falsehood and forgery; as also, "the feloniously uttering or using as genuine any false, forged, and fabricated bonds," &c. "with forged, fabricated, and counterfeited subscriptions thereon, knowing the said bonds," &c. "or the subscriptions thereon, to be false or forged, fabricated and counterfeited," &c.

Sept. 1, 1820.

The indictment, after accusing him of several acts of forgery, charged him with particular acts of uttering them as genuine, knowing them to be forged; "and this he did by delivering, or causing to be delivered, through the hands of John Farish, now or lately residing at Rosefield, in the parish of Annan and shire of Dumfries, the said pretended letter or writing," &c. "to Richard Graham, writer, then writer in Annan, for the purpose of being by him, the said Richard Graham, used and employed as true and genuine;" &c. "he, the said Francis Adams, knowing the said writings and subscriptions to be false, forged, fabricated, and counterfeited." Then followed a similar charge as to the transmission of them to William Johnstone and John Patison, junior, writers in Edinburgh; after which he was charged with ut-

tering them, by producing the forged deeds in the Court of Session. " Whigham, for the pannel, objected to the relevancy of the two first charges of uttering, contained in this indictment, on the ground that the alleged transmission of the alleged forged documents to the pannel's agents does not amount to the crime of using and uttering as genuine."

The Court pronounced the usual interlocutor of relevancy, mentioning, at the same time, that they had " heard parties procurators upon the relevancy thereof,"

No. 15.

ROBERT SURRAGE and Others.—*Menzies.*

Sept. 7, 1820.

*Pannels—Separation of Trial.*—Robert Surrage and others having been indicted for the crimes of discharging loaded fire-arms at the lieges, as also, murder, " Menzies stated, that before their Lordships proceeded to name the assize, he meant to move their Lordships to separate the trial of one of the soldiers from that of the rest, in order that, if he should be acquitted, he might give evidence on their behalf. This melancholy case had originated in a scuffle or affray between some sailors and soldiers, and it was most material for the pannels defence that it should be known how this scuffle commenced. They were strangers in Greenock, and had no means of discovering there who could give evidence on this point; and, in consequence of the strong prejudice which had been most unfairly excited against them, they could not expect that any witness would voluntarily come forward in their favour. From the information he had received, he believed that, from beginning to the end of the precognition,

nothing could be found which would at all implicate Malachi Clinton \* in the crime charged; and that he would be acquitted on the evidence of the witnesses in the prosecution. If, therefore, the Lord Advocate still conceived it necessary to bring Clinton to trial, he considered it his duty to move that he should be tried first by himself, in order that, if acquitted, he might be called by the pannels on their trial as a witness in exculpation."

" *Advocatus* answered, that the proof against Clinton certainly was not such as to warrant his detaining the Court by going over the evidence twice; and as, in the circumstances of the case, there did appear to be some hardship in depriving the others of the benefit of his testimony, he should move their Lordships to desert the diet against him simpliciter." The Court, " in respect of what is above stated, desert the diet against the pannel, Malachi Clinton, simpliciter, and dismiss him from the bar."

JOHN DOUGLAS.—*Hamilton.*

No. 16.

*Breach of Trust—Punishment.*—John Douglas was indicted at the Autumn Circuit held at Ayr for " falsehood, fraud, and breach of trust; and particularly, the fraudulently and feloniously secreting, embezzling, and appropriating any sum or sums of money belonging to others, especially when committed by the accountant or other clerk of any bank or banking company, who has, in the course of the business of such bank or banking company, uplifted, received, and discharged the same, in the name, and upon the account, and for the use and behoof of such bank

Nov. 20, 1820.

\* One of the pannels.

or banking company, by whom he has been so employed."

The indictment contained thirteen charges, of which five were passed from, and the jury found the pannel guilty of all the rest except one; and the sum thus found embezzled amounted to upwards of £1,300.

Lords Pitmilley and Succoth certified the case as to the punishment which ought to be inflicted, and the Court pronounced sentence of transportation for seven years.

No. 17.

THOMAS PEARSON.—*Jardine—Menzies.*

Feb. 16, 1821.

*Witness—Citation.*—Thomas Pearson was indicted for the crime of using and uttering, as genuine, false, forged, or counterfeited notes of the Bank of Scotland and Paisley Banking Company, knowing the same to be false, forged, or counterfeited; and

"Adam Keir, cashier of the Paisley Banking Company, residing at Paisley, being called,—

"Menzies, for the pannel, objected to Keir being admitted as a witness, on the following ground.—That there were two libels raised against the pannel by the public prosecutor: one of them that now under trial, for uttering forged notes of the *Bank of Scotland* and of the *Paisley Bank*; and another, the diet of which also stood for this day, for uttering forged notes of the *Paisley Bank*: that on the 6th February letters of diligence had been raised and signetted for citing the pannel, witnesses, and assizers, applicable to the libel now under trial, and also letters of diligence for a similar purpose, applicable to the (other) libel: that on examining the execution return-

ed of the citation of Adam Keir, it will be found that it does not bear that the citation had been given in virtue of the diligence applicable to this particular libel, seeing it describes it merely by reference to its date, the 6th February ; which description is equally applicable to the other diligence. Neither does the execution specify the particular libel or the particular crime to which it relates, either of which circumstances would have obviated the objectionable ambiguity : that, by the law of Scotland, it is necessary, before a witness can be admitted, that it be proved he has been cited in virtue of a competent warrant, and to give evidence in the particular case under trial : that the only legal evidence of this is the execution returned ; but here, as the execution neither describes the libel nor the crime, and refers to the particular diligence in virtue of which the citation was given merely by its date, the 6th February, on which day another diligence, applicable to another libel, against the pannel was raised and signeted, it does not prove the witness to have been cited in virtue of the warrant under which alone he could legally be cited, viz. the letters of diligence applicable to the particular libel now under trial : There was thus no evidence that the witness had been legally cited ; consequently, he could not be examined. He referred to Hume, vol. ii, p. 253, case of MacGregor, 6th August 1753 ; and to the case of Gunn alias Meniart, Inverness, September 1818."

" Hope and Mr. Solicitor-General answered, that the objection now stated by the pannel ought to be repelled on two separate grounds.

" 1. That granting, for the sake of argument, that there is an analogy between the citation of a pannel

and a witness, still the letters of diligence issued in this case sufficiently specify the crime libelled in the indictment ; and what is most important, the letters of diligence direct and require the officers of the law to summon the witnesses, whose names are subscribed in the list of witnesses signed by the complainer, (the Lord Advocate), and empower such officers only to summon the witnesses contained in that list. Now, in the execution returned in the other case, the name of a witness is included, whose name is not in the list of witnesses which is annexed to the present indictment : and, therefore, as reference must be had, in judging of the correctness of the execution, to all the parts of the process, and not to the letters of diligence merely, it sufficiently appears on the face of the execution that it applies to the letters of diligence and indictment in this particular case.

“ 2. That the authorities referred to, and the arguments used by the pannel, apply exclusively to the citation of pannels, and that totally different principles apply to the citation of witnesses : that, in the former case, the executions must properly and clearly apply to the different indictments raised against the pannel ; for he cannot be called on to plead to an indictment, unless brought into Court by the process of law, executed in strict form, by a citation which calls upon him to plead to a particular indictment : that in the case of M'Gregor the uncertainty was to which of the *indictments* the executions applied, (a circumstance which does not occur in the present case) ; and, in fact, the pannel was not summoned to plead to any particular indictment. In regard, again, to the citation of witnesses, different principles apply. If a witness is legally and effectually cited un-

der the process of law, and brought into Court under a compulsitor, which he was bound to obey,—if a regular warrant is issued for the citation of the witness,—if he is legally and correctly cited,—if the execution of citation is *ex facie* probative and accurate; the Court cannot refuse to receive him as a witness, and the pannel cannot object to his examination: that the pannel is supposed to object to the execution returned against witnesses, in the character of the witness himself; and, upon that fiction, he may object to the regularity of the execution, or to the legality of the execution: but if there is no such objection, the witnesses must be received: that it seemed to be rather a strange objection to urge that a witness is not properly cited, because there is another execution returned against him likewise, compelling him to appear on the same day as a witness against the same person: that the witness not being entitled himself to object to the citation and execution, the pannel could not state any objection.”

The Court “having considered the foregoing objection, and answer thereto, and heard parties procurators fully thereon, repel the said objection, and allow the witness to be examined.”

THOMAS PEARSON.—*Jardine—Menzies.*

No. 18.

*Indictment—Locus Delicti.*—Thomas Pearson was March 15, 1821, indicted for the crime of uttering forged notes as genuine; and, in the fifth charge, the *locus delicti* was thus described.—“And farther, you, the said Thomas Pearson, did, time aforesaid, within, or in the immediate vicinity of, the shop in St. Andrew’s Street, occupied by John Laing, saddler, fraudulently use and



utter," &c. On an objection by the pannel, the Court "having considered the indictment, &c. find the same relevant to infer the pains of law, with the exception of the fifth charge, which they find irrelevant, in respect the *locus delicti* is not sufficiently specified."

No. 19.

WILLIAM MONTGOMERIE.—*Shaw.*

May 21, 1821.

*Citation.*—William Montgomerie was indicted at Ayr for the crime of rape.—"Which indictment having been read over to the pannel at the last Circuit Court of Justiciary held at Ayr, his counsel objected, that the pannel was not bound to plead to the said indictment, in respect that the messenger's execution did not bear that the copies of the lists of witnesses and assizers alleged to have been served upon him were signed by the messenger on each page, as required by the act of adjournal 1803. And the Lord Justice-Clerk, Judge on the said Circuit, in respect of said objection, and the variation as to the practice on this point which appeared at said Circuit, certified the case to this Court, and granted warrant for transmitting the pannel."—"Parties procurators having been heard upon the said objection, the Court pronounced the following judgment.—Having considered the objection stated in bar of trial at the Circuit Court at Ayr, certification thereof to this Court, and heard parties procurators upon the said objection, sustain the said objection, and dismiss the indictment, and the pannel from the bar."

**JAMES JOSS.—Cockburn—Hunter.**

No. 20.

*Punishment—Furtum Grave.*—James Joss was indicted at Aberdeen for theft, aggravated by house-breaking. May 21, 1821.

In the minor proposition the charge of theft was thus libelled.—“ And did then and there break into, or force open, with a razor, or other instrument, the door of a locked press, in a parlour or other apartment in the said house; and did wickedly and feloniously steal, and theftuously carry away from the said press, a portable writing-desk, containing £112 sterling, or thereby, in bank or bankers notes, bills, and other papers and writings, and, in particular, the different bank or bankers notes particularly described in an inventory hereunto annexed.” The jury found the pannel guilty of the theft libelled; and, on a motion for sentence,—

“ Mr. Robert Hunter, as counsel for the pannel, objected, that no capital punishment could follow upon said verdict, in respect the aggravation libelled was passed from; and that the theft of which the pannel was found guilty was not such a *furtum grave* as inferred a capital punishment.

“ And the Lords Hermand and Succoth, Judges on the said Circuit, certified the said verdict to this Court, and granted warrant for transmitting the pannel.”

“ Parties procurators having been heard on the said objection at considerable length, the Court pronounced the following judgment.

“ Having considered the objection stated in bar of

sentence upon the verdict of assize in the Circuit Court at Aberdeen, and the certification thereof to this Court, and heard parties procurators thereon, find, that the crime of which the pannel, by the verdict of assize, is found guilty, is relevant to infer a capital punishment."

Thereafter the public prosecutor restricted the pains of law, and the pannel was sentenced to be transported for life.

No. 21. PETER WALLACE and Others.—*Ivory—Urquhart—Shaw.*

May 21, 1821. *Verdict—Theft and Robbery.*—Peter Wallace and others were indicted at Perth for "the crimes of assault and robbery, as mentioned in the indictment raised against them thereanent, contained in the porteous-roll of the county of Forfar; which indictment being found relevant, and remitted to the knowledge of an assize, the jury found all the pannels guilty of the theft libelled, art and part; and the Advocate-depute having moved for judgment on the said verdict, Messrs. Adam Urquhart and Patrick Shaw, advocates for the pannels, objected to sentence being pronounced on said verdict, in respect the same did not apply to the indictment on record." After hearing parties procurators, the Court adjourned; and, on the 23d, they pronounced this judgment.—"Having considered the verdict of assize returned in the Circuit Court of Justiciary at Perth upon the 17th day of April last, with the certification thereof to this Court, and heard parties procurators upon the objection pleaded in arrest of judgment, find, that no

sentence of punishment can follow against the pannels upon the said verdict ; and, therefore, sustain the objection, and dismiss the pannels from the bar."

JOHN ROBIESON.—*Urquhart—Tait.*

No. 22.

*Citation.*—John Robieson was indicted for theft, by opening lockfast places.—“ The diet of the said indictment having been called,—Urquhart and Tait, for the pannel, objected, that the short copy of citation annexed to the indictment served upon the pannel bore, that a copy of the principal indictment, with the list of witnesses and assizers written on the “ first twenty-two pages hereof, was delivered to the pannel ;” whereas the whole of the assizers names, except seven, were written on the twenty-third and twenty-fourth pages.”

The Court “ having considered the foregoing objection, they sustain the same, and dismiss the indictment, and the pannel from the bar.”

ANN SOMMERVILLE.—*M'Lean.*

No. 23.

*List of Witnesses.*—Ann Sommerville was indicted for child-murder, and the indictment was remitted to an assize. June 4, 1821.

“ His Majesty’s Solicitor-General having proposed to call his first witness, Robert Birrell, sheriff-officer in Haddington,—

“ M'Lean, for the pannel, objected, that this witness could not be examined in the case, as his name was not contained in any authenticated list of the

witnesses served upon the pannel ; the copy of the list of witnesses served upon her not bearing that the same was signed by the public prosecutor, according to the usual practice."

The Court " having considered the foregoing objection, they sustain the same."

## CIRCUIT COURT OF JUSTICIARY.

## NORTH CIRCUIT.

ANN TAYNE.—*Monteath.*

No. 24.

*Witness—Designation.*—In the case of Ann Tayne, for concealment of pregnancy,—on Margaret Munro, midwife in Tain, and wife of Andrew M'Lellan, being offered as a witness,—

INVERNESS.  
April 15, 1819.  
Lord Reston.  
Drummond, A. D.

“ Monteath, for the pannel, objected to this witness, she being designed wife of Andrew M'Lellan in the principal list, and in the copy served on the pannel wife of Andrew M'Lennan, these being totally different names. The witness was, in point of fact, the wife of Andrew M'Lennan.”

“ After some debate on the point, the Lord Reston sustained the objection.”

In the same trial.—

*Declaration.*—“ Monteath, for the pannel, objected to the admission of the second declaration, upon the ground that the first declaration had not been read over to the pannel at the time she emitted the second. The declaration bore generally that the pannel adhered to her former declaration, but did not bear that the first had been read over. The subscribing witnesses had concurred in stating that the pannel did not *request* the first to be read over; but neither of them could depone to the fact, that it

had been so read. On the species facti it was argued, that the second declaration not bearing in gremio the reading of the first, the presumption was, that it had not been read over, and the burden of proving the contrary fell on the prosecutor; and that as he failed in bringing such proof, the second declaration could not be admitted."

Home Drummond, *A. D.* answered,—

" 1. That the second declaration is proved to be a correct statement, in all points, of what the pannel said; and it bears that the pannel *adhered* to the first, which she could not have done if it had not been read over, or so fresh in her recollection as to render the reading over unnecessary: that it is not necessary that a second declaration should bear in gremio that the first was read over; and that official witnesses to declarations cannot be expected to swear to all that passes, from memory, at the numerous examinations they may attend, or to do more than confirm the accuracy of what they see authenticated by their own subscriptions: that if it were the duty of the magistrate to have read over the first before allowing her to emit the second, he must be presumed to have done so in absence of all proof to the contrary: that the circumstance (proved to be true) of the first being *adhered* to, confirms this natural presumption. 2. That esto the first declaration had not been read over at taking the second, this has never been decided to be necessary, unless where desired by the pannel; nor any objection been sustained, except on *refusal* to read over when desired by the pannel: that there is not only no precedent, but no authority whatever to support this objection, except the obiter dicta of individual judges

speaking on a totally different case, and where no such point as this was under discussion, or before the Court; and that there is no reasonable ground for entertaining an objection to the omission of what the pannel does not wish to have done, and what is proved to have been totally useless by the fact, that the pannel adhered to the first declaration."

" Lord Reston having heard the objection and answers, in respect of what is stated by Mr. Hume, (vol. ii, p. 321,) to have fallen from the Bench on the trial of Murray Stewart, sustains the objection."

ALEXANDER GUNN *alias* MENIART.

No. 25.

*List of Witnesses.*—In the case of Alexander Gunn *alias* Meniart, " upon proceeding to call witnesses in support of the libel, the pannel's counsel objected, that the list of witnesses served on the pannel did not bear to be signed by the public prosecutor. The objection was sustained on being verified by production of the copy;" and the pannel had a verdict of not guilty.

INVERNESS.

April 16, 1819.

Lord Reston.

Drummond, A. D.

ALEXANDER BUCHAN.—*H. J. Robertson.*

No. 26.

*Witness—Pupil.*—In the case of Alexander Buchan for theft, by housebreaking,—

PERTH.

April 26, 1819.

Lord Gillies.

David M'Ewen was produced as a witness, who " being a boy under fourteen years of age, who said he did not understand the nature of an oath, was not put upon oath, but allowed to be examined."



## No. 27.

JOHN M'FARLANE.—*Burn.*

PERTH.  
April 27, 1819.

*Insanity.*—John M'Farlane was indicted for the crime of sheep-stealing.—

“ Burn, for the pannel, stated in bar of trial of the prisoner, that he, the pannel, is now, and for some time past has been insane; and, therefore, unfit to stand his trial, or plead to any charge brought against him.”

Lord Gillies certified the objection to the High Court.\*

## No. 28.

ALEXANDER and WILLIAM M'LEOD.—*Alison.*

INVERNESS.  
Sept. 22, 1819.

Lord Succoth.  
Hope, A. D.

*Verdict.*—In the case of Alexander and William M'Leod, Alison objected, in arrest of judgment, that the designation of one of the jury was erroneous; but a proof before answer being allowed, it failed to establish the objection; and, therefore, it was repelled, without discussing the point of law.

## No. 29.

ROBERT HAY.—*Jeffrey—Cullen.*

ABERDEEN.  
Sept. 27, 1819.

Lords Hermand  
and Succoth.  
Hope, A. D.

*Forgery—Production of Forged Deed—Proof.*—Robert Hay was indicted for forgery.—“ Jeffrey and Cullen, for the pannel, stated as an objection *in limine*, that the document alleged to have been forged by the pannel was not produced. It was no answer for the public prosecutor to say that it was destroyed by the pannel. It was notorious that a pannel, in many

\* No farther notice is taken of this case in the record.

situations, might profit by his own act and deed, as by making away with a principal witness, or otherwise preventing his evidence: As it was, therefore, apparent from the face of the libel, that proof was to be adduced which never could convict the pannel, it was useless, and worse than useless, to remit him to the knowledge of an assize.

“ The objection rested on law and expediency, on the one hand, and on the practice of this Court, on the other.

“ 1. In the analogous civil process of proving the tenor, it was maintained, that written evidence was necessary in addition to parole proof. Here the public prosecutor founds on no writings. Ersk. iv, 1, 28.

“ In the other analogous civil process of reduction and improbation, decree follows, although no document be produced: but it is merely a decree of certification; the writing is not improven. If such be the case in civilibus, a fortiori in criminalibus. Hume, p. 159; Case of Barclay, June 26, 1670.

“ No dependence is to be put on the transient recollections of those who saw the document, but whose signatures were not forged. It is worse than hearsay evidence to take their opinion of the forgery.

“ 2. The practice of the Court of Justiciary, it was maintained, was favourable to the plea now stated for the pannel.

“ No example is extant of a case in the Criminal Court, where a jury, without production of the forged document, convicted a pannel of forgery. Of cases before the Court of Session Mr. Hume mentions two, in which the contrary found. Burnet, at p. 199, details the cases in point. The first case in the Justiciary Court is that of Elliot, where Justice-Clerk Rae's opinion was clearly in favour of the ob- Hume, i, p. 160.

jection. The only other case before the Criminal Court was the case of Adams, where a general opinion in favour of the objection was stated from the Bench."

" Hope, Advocate-depute, answered, that the indictment charged the pannel with having destroyed the forged document ; and though it was true that the pannel must derive benefit from that act, in so far as the evidence for the prosecutor might be weakened by the want of the forged document ; yet, on the other hand, it was contrary to reason to suppose that the pannel could *plead* his own act and deed as a bar to trial, and as entitling him to be dismissed instanter : that, farther, in a great variety of cases, both in the civil and criminal courts, the same objection to the competency of trial had been either overruled or disregarded."

" The Lords having considered the indictment against Robert Hay, pannel, the foregoing objection, and answer thereto, and having heard parties procurators thereupon, repel the said objection."

In the same case,—

*Proof.*—" Hugh Croft, agent for the said banking company at Banff, being called and interrogated by the public prosecutor as to the contents of the bill, Jeffrey, for the pannel, objected to any questions being put as to the contents of the forged document, as he considered it illegal and informal for the public prosecutor to lead parole proof as to the contents of a document which he had not libelled in the body of the indictment as a production on the trial."—" The Lords having considered the foregoing objection, they repel the same, and allow the examination to proceed."

DAVID GALL.—*H. J. Robertson.*

No. 30.

*List of Witnesses.*—In the case of David Gall, upon calling the first witness,—“ It was objected by the counsel for David Gall, that the copy of the list of witnesses served upon him at citation did not bear that the principal list was subscribed by the Advocate-depute; whereupon the Court sustained the objection,”

PERTH.  
May 9, 1820.

Lords Justice-Clerk  
and Pitmilley.  
Maconochie, A. D.

WILLIAM SHEPPERD.—*Wilson.*

No. 31.

*List of Witnesses.*—In the case of William Shepperd,—“ An objection was stated by the counsel for the pannel to any of the witnesses in the list served on the pannel being adduced, in respect that list bore to be signed by Mr. Home Drummond as Advocate-depute; whereas the principal list was signed by John Hope as Advocate-depute; and that objection being sustained by the Court, the jury found the pannel not guilty.”

PERTH.  
Sept. 6, 1820.

Lord Meadowbank.  
Drummond, A. D.

HUGH AUSTIN.—*M'Lean.*

No. 32.

*List of Assize—Statute 1672, c. 16.*—In the case of Hugh Austin, “ M'Lean, as counsel for the pannel, objected, that the principal list of assize for the trial of the cases contained in the porteous-roll for Inverness-shire was signed by only two Judges, although the attested double bore to be signed by three Judges. The regulations 1672 require that the names and designations of the persons who are to pass on assizes

INVERNESS.  
Sept. 12, 1820.

Lord Gillies.  
M'Neill, A. D.

shall be inserted in a list signed by a quorum of the Court : that as this regulation has here not been complied with, none of the assizers have been regularly summoned ; and, therefore, cannot pass on the assize of the pannel."

" Lord Gillies sustained the objection."

No. 33.

DAVID ROSS.—*Grant.*

INVERNESS.  
April 26, 1821.

Lords Hermand  
and Succoth.  
Menzies, A. D.

*Witness—Agency.*—In the case of David Ross, Murdo M'Kenzie being called as a witness,—

" Grant, for the pannel, objected partial counsel against the witness, in so far as he had acted as agent for the prosecution, suggested the mode of inquiry, and the witnesses to be adduced : and, in particular, after the apprehension and incarceration of the pannel, and when he was alleged to have escaped from jail, he, the said Murdo M'Kenzie, Esquire, had caused to be inserted in the Inverness Courier and Inverness Journal newspapers the following advertisement.—" Escaped out of the jail in Dingwall in Ross-shire ;"—which, after stating the crimes of which he was accused, and describing him, bears,—

" The crimes of which he is accused are of so deep a dye, and so novel in this country, that it is hoped clergymen will give warning in their respective parishes to their parishioners to be on the look-out to discover him. Whoever will apprehend and secure the said David Ross in any jail in the kingdom, or give such information to M. M'Kenzie, Esquire, of Ardross, by Bonar Bridge, as may lead to his apprehension, shall receive a reward of fifty pounds sterling."—And that the said witness had in consequence

thereof actually paid the said sum of £50 sterling, or granted his bill for the same, as such reward accordingly, for the re-apprehension of the pannel; whereby the said Murdo M'Kenzie has evinced such corrupt, or such undue zeal for the condemnation of the pannel, and such an improper interference with the due course of justice, as to disqualify him from being a witness in this cause."

"Menzies, Advocate-depute, contended, that none of the facts alleged by the pannel evinced that the witness was actuated in what he did by any undue, illegal, or corrupt motive, which must be proved to have existed before any objection like the present can be sustained. Hume, ii, 339."

After examining the witness,—

"The Lords having considered the evidence of the said Murdo M'Kenzie, sustain the objection to his admissibility, and find that he cannot be examined as a witness in this case."

JOHN DAVIDSON and Others.—*Grant.*

No. 34.

*Deforcement—Proof.*—In the case of John Davidson and others, indicted for deforcement,—in the course of the evidence for the pannels,—

"Grant, for the pannels, offered to adduce the sheriff-clerks of Inverness and Caithness, the sheriff-substitute of Ross-shire at Tain, and the depute sheriff-clerk of Inverness-shire at Fort-William, to prove that the constant practice in the sheriff-courts in cases of obstructions of the executions of ejections, in consequence of lockfast doors, is for the officer to make a return to the Sheriff of such obstruction, and

INVERNESS.  
April 28, 1821.

—  
Lords Hermand  
and Succoth.  
Menzies, A. D.

thereupon to obtain a warrant for using the king's keys to make open doors; and he represented, that, without such warrant, the attempt, in the present instance, to force open the door of the house of Wester, was illegal, and the resistance thereto justifiable. He, therefore, craved, that these witnesses be received to prove that the practice is in conformity with the principles and analogies of the law."

" Menzies, Advocate-depute, answered, that the proof now offered was incompetent and irrelevant; because, in the *first* place, it was of no consequence what the practice had been, unless the law authorized the practice: *2dly*, That what the law was could only be shewn by the recognised authorities in the law of Scotland, and could not be proved by practice, especially the practice of inferior courts, in a remote district of the country: *3dly*, That supposing the practice of inferior courts might be sufficient to fix the law as to their proceedings; yet the practice of inferior courts could not regulate the proceedings of the Supreme Court, or fix the law as to it; and the letters of ejection had in this case been issued by the Supreme Court. On these grounds, he craved the Court to refuse to receive the proof offered as irrelevant and incompetent."

" The Lords having considered the foregoing minute, and answer thereto by the Advocate-depute, sustain the objections to the proof offered, and find that the same is irrelevant."

ROBERT M'DONALD.—*Grant.*

No 35.

*Intercourse with Assize.*—In the case of Robert M'Donald, after the pannel had been remitted to an assize, and ten witnesses had been examined,—“ During this part of the examination of the witness one of the jury having expressed a wish to retire, the presiding Judge stated, that it was a very proper time, and directed the macer to conduct the jury to their retiring room, when thirteen of them retired from the Court, and a short time thereafter twelve of them returned to the box; but James Grant, merchant in Forres, the thirteenth jurymen, being still absent, and in a short time the macer being directed to go to the retiring room, returned, and stated to the Court, that the jurymen was not there; nor could any thing be learned of him about the Court for the space of six or seven minutes, when James Grant, the jurymen, returned to the Court; and upon being asked to account for his absence, stated, that he had misunderstood the direction of the Court, and, supposing that the jury had been allowed to go out to the open air for a little, he went down the street of Inverness to Cant's Inn, and spoke a few words to his landlord, who asked a question or two about another gentleman who lodged with him; but that he had no conversation with him relative to the subject of this trial: that he stood by him till some person, whom he does not know, came in a hurry from the Court, saying he was amissing, and should not have gone away; and that he returned with that person to the Court as fast as he could, not having had any conversation with that last-mentioned person, or any other person, on the subject of this day's trial.”

INVERNESS.

Sept. 26, 1821.

\_\_\_\_\_  
 Lords Justice-Clerk  
 and Pitmilly.  
 Maconochie, A. D.



“ Grant, for the pannel, objected, that on the face of the record, as above made up, it appeared that the juror above named had, after the commencement of the trial, quitted the Court-house with the permission of the Court, but without being attended by an officer of Court, or being under any controul, and had the opportunity of communicating with all manner of persons relative to the subject of the trial ; and, therefore, that the trial ought not to proceed.”

“ The Advocate-depute answered, that the objection now made was groundless, and ought to be repelled. By the statute 1587, ch. 91, any intercourse with the assize *after* inclosure, how trifling soever it be, is fatal to the whole procedure ; and the Court is bound, when such intercourse has taken place, at once to assilzie the pannel simpliciter, and dismiss him from the bar. But *before* inclosure the case is different. There the statute 1587 does not apply, and matters remain to be regulated by the rules of the common law. In every case, therefore, where an objection is taken to the regularity of the procedure, the Court must consider the circumstances which have occurred, and consider whether the alleged irregularity is a mere innocent inadvertency, or is of such a description as ought, in substantial justice, to annul the whole procedure. The law is, accordingly, so laid down by Mr. Hume, vol. ii, p. 401, (second edit.) where a variety of cases are referred to, which show the practice of the Court, in considering objections of this nature, to be conformable to what is now stated. He also begged leave to refer to the case of Thomson and Neilson, decided and reported by Mr. Hume, vol. ii, p. 406, (second edit.). After an interlocutor had been pronounced, ordering the jury

*instantly* to retire, inclose, and return their verdict; one of the jury had left the Court-house, and gone to a tavern, where he remained absent about twenty minutes, when he returned, and was present with the rest of the jury when they were inclosed and made up their verdict; and then, after advising informations, the High Court had repelled the objection taken in arrest of judgment, and the pannels received sentence of death. The circumstances of that case were infinitely stronger than the present, where the period of absence was so short, and where there was not the shadow of ground for believing that the slightest injury had arisen from the accidental absence of this juror. On the whole, he submitted that the objection ought to be repelled."

The Lords "having considered the circumstances entered in the record, and the pleadings of counsel thereupon before stated, they repel the objection founded upon the circumstances that have occurred in this case, and allow the trial to proceed."

ALEXANDER DUNCAN and SAMUEL HIPPLESLEY.—  
*Urquhart.*

No. 36.

*Declaration of Pannel.*—In the case of Alexander Duncan and Samuel Hipplesey,—

ABERDEEN.  
October 3, 1821.

"Urquhart, for the pannel, Samuel Hipplesey, objected, that the second declaration of the said Samuel Hipplesey, dated 18th July 1821, could not be received as evidence against him, in respect that it did not bear that the former declaration had been read over to him previous to his examination at that time, nor had the public prosecutor brought any other proof of that fact, which it was incumbent on

Lords Justice-Clerk  
and Pitmilley.  
Maconochie, A. D

him to do, according to the opinion said to have been expressed by the Court in the case of *Murray Stewart*; Hume, ii, 321."

"The Advocate-depute answered, that the objection would be good, if the pannel could prove that, in point of fact, the first declaration had not been read over when the second was emitted; but no offer of any such proof was here made; and the only objection stated was, that the second declaration did not bear in gremio the fact to be so. Now, he submitted the presumption to be, that *omnia rite et solemniter acta*; and that unless the pannel made a relevant averment to the contrary, and substantiated it by competent evidence, it must be held that the whole proceedings had been regularly conducted. Before a declaration of a prisoner could be received in evidence, the prosecutor must prove that it was freely and voluntarily emitted; and that the party was sober and in his senses at the time; but he was no more bound to prove that the prior declarations had been read over when the latter were taken, than that the prisoner had been warned by the magistrate examiner, that he was at liberty either to answer the questions put to him or not as he might think fit; a circumstance at least as indispensable as that the first declaration should be read over when second was emitted.

"In the case of *Murray Stewart*, the fact was, that the Magistrate had then positively declined to permit the prior declaration to be read over when asked by the prisoner; and, therefore, the Court had refused to permit the declaration then taken to be put in evidence to the jury; and the observation on the Bench, (of which Mr. Hume appeared to have received a most erroneous account), applied solely to

that state of the fact. The objection which the Court has hitherto sustained is not that the subsequent declarations did not bear in gremio that the former had been read over, or that the prosecutor did not prove that to have been done, but that the fact was otherwise, and that the previous declaration had not been so read. Now, it was clearly the duty of the party making any objection to prove it; but this was not done here; and, therefore, the objection ought to be repelled."

The Court "having considered the foregoing objection, and heard parties, repel the objection, and allow the declarations to be read."

The Advocate-depute stated, that in the circumstances of the case, and as their Lordships judgment prevented any doubt being entertained on the law, he did not desire that the declaration should be read to the jury.

## WEST CIRCUIT.

No. 37.

JOHN BUCHANAN.—*Jeffrey*.

GLASGOW.

April 30, 1819.

—  
 Lords Justice-Clerk  
 and Hermand.

Hope, *A. D.*

*Citation*.—In the case of John Buchanan, “ Jeffrey, for the pannel, objected, that the pannel could not be tried on the indictment read against him, in respect that the messenger had not, in terms of the act of adjournal of July 1803, properly specified the number of pages in the copy of citation annexed to the copy of the libel; and that the copy of citation bore, that the copy or double of the indictment, and of the lists of witnesses and assizers, was written on this and the “ ten preceding pages ;” whereas the copy or double delivered to the pannel, with the copy of citation at the foot of it, consisted of three sheets, or twelve pages ; and there were, in fact, eleven pages preceding that on which the copy of citation was written.”

“ Hope, Advocate-depute, answered, that it was not disputed that the pannel had been served with a just and true copy or double of the indictment; and contended, that the acts of adjournal of 1803 and 1818 had been sufficiently complied with, inasmuch as the mistake of numbering a page twice completely explained itself: that as the page numbered 9 instead of 10 was on the same sheet with the first one numbered 9, the case was in terminis the same with that which occurred in the civil court, where the testing clause of a deed, written on three pages of the same sheet, accidentally bore on the preceding page, instead of these two preceding pages; an objection which has not been sustained:

And, *lastly*, That the pannel had no interest to state this objection; for, if any thing has been subdolosly inserted into the copy of the indictment served on the pannel which is not in the record, then this discrepancy is itself a good objection in favour of the pannel, as the copy served on him must conform to the record."

The Lords certified the case to the High Court.\*

ROBERT M'KINLAY.—*Pyper*.

No. 38.

*Citation*.—On calling the diet in the case of Robert M'Kinlay *alias* Rough Rab, and on an objection by his counsel,—“The Lords, in respect it appears from the porteous-roll that there are more indictments contained therein against the said Robert M'Kinlay *alias* Rough Rab than one; and that it appears from the general execution against delinquents in the said roll, that there was only one indictment served, without distinguishing to which of the indictments the said general execution applied; therefore, sustain the objection to the said execution as being defective.”

GLASGOW.  
Sept. 29, 1819.  
Lords Pitmilley and  
Meadowbank.  
Drummond, A. D.

ROBERT WYLLIE and AGNES RICHARDSON.—*Monteath*.

No. 39.

*Indictment—Specific Charge as to Time*.—Robert Wyllie was indicted for theft, and Agnes Richardson *alias* Findlater for reset of theft. After accusing Wyllie of the theft, and libelling the particular time,—the indictment charged Richardson with the reset in these terms.—

GLASGOW.  
April 26, 1820.  
Lords Gillies and  
Succoth.  
Hope, A. D.

\* No farther notice is taken of this case in the record.

“ And you, the said Agnes Richardson or Findlater, did, in the School Wynd of Paisley, or in one or other of the closes in the said wynd, or at some other place to the prosecutor unknown, wickedly and feloniously reset and receive the said silver watch from the said Robert Wyllie, you knowing the same to have been stolen.”

“ Monteath, for the pannel, Richardson, objected to the relevancy of the indictment, in so far as she was concerned, on the ground that the libel did not specify any time within which she was alleged to have committed the crime charged. It might be true that it was sufficiently obvious that the prosecutor intended to charge the reset as having been committed at the same time with the theft charged against the prisoner, Wyllie; but as this was not stated in terminis, and as the crimes were perfectly distinct and separate, there was no room for implication.”

The “ Lords having heard counsel for the parties, sustain the objection.”

## No. 40.

DANIEL GRANT and Others.—*Pyper*.

GLASGOW.

October 6, 1820.

*Witness—Prevarication—Promise of Reward.*—In the case of Daniel Grant and others,—after the examination in initialibus of John Dick, (which is recorded),—

Lords Justice-Clerk  
and Hermand.  
Maconochie, A. D.

“ Pyper, for the pannels, objected to the examination of John Dick as a witness in causa,—1st, Because he has already prevaricated and contradicted himself in the course of his examination in initialibus, having stated in one part of that examination, that Mr. Salmond, the procurator-fiscal, desired him to engage to

give evidence against the prisoners, which he had stated to Mr. Salmond was false ; and afterwards, that Mr. Salmond had desired him to speak the truth ; and held out that prospect of advantage to which he had deponed, to induce him to speak the truth. The rule, *falsum in uno falsum in omnibus*, applies here, and utterly destroys the credibility of the witness. Hume, ii, p. 365.

“ *2dly*, The witness has sworn that he himself is quite innocent of the crime charged against the panels ; whereas he is attempted to be adduced in *causa* in the quality of *socius criminis*. The prosecutor is called upon to confess or deny whether this is the fact ; and if he admits it, it is perfectly obvious that he cannot be allowed to adduce a witness, whom he thus acknowledges to have already perjured himself. And, *lastly*, The witness has said that Mr. Salmond told him of the prospect of the charge of assault against him, to which he refers in his disposition, being remitted to the Magistrates, in the event of his giving evidence in this case, instead of being tried in this Court, before which the libel would appear to have been raised : and that he, the witness, has declared that he considers this would be an advantage to him, as it unquestionably would, the Magistrates not having it in their power to inflict the punishments competent in this Court. All intercourse between a party and his witnesses, previous to the trial, which may tend to give him an undue bias, or improperly influence him in telling his story, is highly objectionable ; and, according to the doctrine of Mr. Hume, vol. ii, p. 364, is sufficient to cast the witness ; and in the case of M’Kinlay, mentioned by that author in a note to the same page, it was found that it was of no



consequence to inquire whether the witness, who being examined in initialibus, depones, that he is about to give his testimony in causa under the influence of a promise, is speaking the truth or a falsehood, in deponing that a promise or reward has been made, because in either case he is completely discredited. For these reasons, he contended that this witness was inadmissible."

The Advocate-depute answered at considerable length,—admitting that the witness had prevaricated, which he alleged was for the purpose of attempting to disqualify himself as a witness, but contending, that although this might affect his *credit*, it could not prevent his *admissibility* as a witness; and that as to the case of M·Kinlay, it was not only different from this, as the witness had there deponed, that there was an engagement then subsisting between him and the public prosecutor, and that he relied on the performance of that engagement; but that the opinion said to have been then given from the Bench was contrary to the principles of the law of Scotland, and had been considered erroneous.

The Lords "having considered the deposition of the said John Dick, with foregoing objection, and answer, repel the said objection, and allow the witness to be examined in causa."

GEORGE LINDSAY and JOHN DICK.—*Shaw.*

No 41.

*List of Witnesses—Erasure.*—In the case of George Lindsay and John Dick, when Elizabeth Munro, a witness for the crown, was called,—

“ Shaw objected to the examination of this witness, in respect her designation was written on an erasure in the record copy of the list of witnesses.”

“ The Advocate-depute answered, that it was not pretended there was any discrepancy between the designation of this witness in the principal list of witnesses, and that served on the pannel; and that as to the fact of the designation being written on an erasure, their Lordships must be aware, that from the designations of witnesses, as well as the description of places, having frequently to be corrected by the local magistrate, after the indictments are transmitted from the Justiciary-office at Edinburgh, erasures must take place; and, therefore, if that were to afford a valid objection, the ends of justice might in many cases be totally defeated.”

The Court “ having considered the foregoing objection, with the answer thereto, repel the same, and allow the witness to be examined.”

GLASGOW.  
October 9, 1820.  
Lords Justice-Clerk  
and Hermand.  
Maconochie, A. D.

GEORGE BROWN and Others.—*Shaw.*

No. 42.

*Citation—Statute 1555, c. 33—Fugitation.*—George Brown and others were indicted for theft.

“ Shaw, for Brown, M'Givans, and M'Kelway, objected to the citation against all and each of the said persons,—that their citation at the market-cross appeared by the executions to have been given one day

GLASGOW.  
October 11, 1820.  
Lords Justice-Clerk  
and Hermand.  
Maconochie, A. D.

before that at their dwelling-place: that this was clearly a preposterous proceeding, and contrary to the express terms of the statute 1555, c. 33; and he, therefore, submitted that the libel ought to be dismissed."

"The Advocate-depute stated, that from the terms of the statute now read the objection appeared to be well founded."

The "Lords having considered the foregoing objection, sustain the same, and dismiss the libel."

**No. 43. DUNCAN GALBREATH and Others.—*M'Lean*.**

INVERARY.  
Sept. 10, 1821.

Lord Succoth.  
Hope, A. D.

*Citation—Pannel—Designation.*—In the case of Duncan Galbreath and others,—“Mr. J. H. M'Lean, advocate for the pannels, Angus and Dugald Galbreath, objected to the citation given to them,—that they were not what they were there described to be, viz. “tenants in New Ulva,” but resided with their father, who was tenant there.” The Lord Succoth, “after hearing the Advocate-depute in answer to the objection, repelled the same as being too critical, the designation being such as could not mislead.”

**No. 44. DONALD RANKINE.—*Fletcher—M'Donald*.**

INVERARY.  
Sept. 11, 1821.

Lord Succoth.  
Hope, A. D.

*Witness—Agency.*—Donald M'Phie being called as a witness in the case of Donald Rankine,—“It was objected by the counsel for the pannel, that he, the witness, had acted as a subordinate agent for the public prosecutor in this case; and in support of this objection the following witnesses were adduced and examined.”

“ Fletcher stated, that the evidence of these witnesses went to prove, that the proposed witness wrote a letter to the procurator-fiscal anent the robbery ; and that, in consequence, a search warrant was obtained from the Sheriff, and transmitted to the witness, who put it into the hands of a sheriff-officer : —he accompanied this officer for the purpose of identifying the stolen property. While at the house of the prisoner’s uncle, the witness procured a copy of a letter from the Edinburgh agent of the prisoner to his agent at Inverary.”

“ Hope, for the Crown, submitted, that the witness having been injured, was entitled to give information ; and was directed by the procurator-fiscal, on the occasion alluded to, to accompany the sheriff-officer on the search, as is customary, to identify the stolen property ; and that this was proper and necessary : that the witness may have thought the letter alluded to was evidence ; and, therefore, wished to have a copy ; and though the witness was mistaken in this point, yet that shewed no improper zeal which could disqualify the witness.”

Lord Succoth “ repels the objection.”

DAVID MUIR.—*M’Lean*.

No. 45.

*Witness—Designation.*—In the case of David Muir for assault,—“ Upon the first witness being called, M’Lean, for the pannel, objected—The witness is designed M’Tiggan, and has answered in initialibus that his name is M’Figgan. Being the person assaulted, no verdict of assault upon him under this indictment can be returned. This being admitted by the

INVERARY.  
Sept. 12, 1821.

Lord Succoth.  
Hope, A. D.

Advocate-depute, no witnesses were examined ; and the jury found the pannel not guilty."

## No. 46.

WILLIAM DYER.—*Pyper*.

GLASGOW.

Sept. 21, 1821.

—  
 Lords Gillies and  
 Succoth.

Hope, A. D.

*Reset of Theft—Specific Charge.*—William Dyer was indicted for theft by house-breaking, also reset of theft. After charging him with the theft of a number of articles particularly specified, the indictment proceeded thus.—“ Otherwise, time aforesaid, the said William Dyer did, within his house in the Gallowgate of Glasgow, or in some other place to the prosecutor unknown, wickedly and feloniously reset and receive the articles particularly above mentioned, or part thereof, knowing the same to have been stolen.”—“ Pyper, for the pannel, objected, that the alternative charge in the indictment of reset of theft was not sufficiently specific to entitle the prosecutor to go to a proof upon it. In support of the objection, he referred to Mr. Hume, vol. ii, p. 181; and the case of Hamilton, 17th July 1811, stated in a foot note in same page.”

“ Hope, Advocate-depute, answered, that the indictment in this case charged the reset in the form universally sustained as relevant ; and that either the reference in Hume to the case of Hamilton was inaccurate, as he rather believed it was, or that the doctrine therein laid down was not sound in point of law.”

“ The objection was repelled.”

BARNARD KEAN.—*Pyper.*

No. 47.

*Witness—Designation.*—In the case of Barnard Kean, on Neil Munro being called as a witness,—

GLASGOW.

Sept. 21, 1821.

“ Pyper objected, that he really resided at No. 158, Trongate Street of Glasgow, and not at 128, as designed in the principal list of witnesses, and also in the list served on the pannel; and that, therefore, the witness was wrong designed.”

Lords Gillies and  
Succoth.  
Hope, A. D.

The Lords “ having sustained the objection, and there being no other witnesses adduced, the jury found the pannel not guilty.”

JOHN CONNOR.—*Napier.*

No. 48.

*Indictment—Copy.*—In the case of John Connor,—

GLASGOW.

Sept. 22, 1821.

“ Napier, for the pannel, objected, that the copy of the criminal letters served on the pannel did not bear to be signed by the clerk of Court.”

Lords Gillies and  
Succoth.  
Hope, A. D.

Upon inspection of the document, this appearing to be the case, the Court “ sustained the objection.”

## SOUTH CIRCUIT.

No. 49.

PETER M'KINLAY and Others.—*Whigham.*

DUMFRIES.

April 17, 1819.

Lords Pitmilley  
and Succoth.

Maconochie, A. D.

*Verdict.*—In the case of Peter M'Kinlay and others, the jury returned the following viva voce verdict.—

“ The jury finds the pannels guilty in terms of their own confession.”

“ Whigham, for the pannels, objected to sentence being pronounced against the prisoners, that the verdict had not been delivered nor recorded in proper form, inasmuch as it did not appear that the jury had chosen a chancellor to speak for them, and that the verdict had been delivered by the mouth of the said chancellor : that this was an essential form before the act authorizing viva voce verdicts ; and that the act not having expressly dispensed with this form, it is still necessary.”

“ Mr. Advocate-depute answered, that the verdict in the present case had been recorded in the manner practised since the enactment of the statute permitting verdicts to be returned viva voce. The act of parliament requires that the “ verdict be taken down and recorded : ” but it does not require that the name of the chancellor chosen by the jury as their organ to deliver their verdict to the Court should be specified in the record. There could have been no propriety, but the reverse, in its having done so. Accordingly, it is neither required by the statute, nor has it been the general practice since its enactment, to mention the name of the chancellor in recording the verdict. On the whole, he submitted

that the objection was frivolous in the extreme, and ought to be repelled."

"The Court having heard parties procurators upon the foregoing objection to the verdict, repel the same, and find that sentence may proceed."

They had sentence of death.

SAMUEL FERGUSON and Others.—*Henderson.*

No. 50.

*Declaration of Pannel.*—In the case of Samuel Ferguson and others for theft,—

"Before the declarations were read, the procurator for the pannel, Samuel Ferguson, objected to the declarations being read, and averred, that the pannel was induced to emit his declarations under the allurements of promises; and offered instantly to prove by the oath of John Fingland, carrier, whose goods are alleged in the indictment to be stolen from his cart; and also by the oath of Robert Dalgetty, sheriff-officer in Thornhill, county of Dumfries, that promises were made to the pannel by them, the said John Fingland and Robert Dalgetty, that if the pannel would confess in his declaration that he had taken the articles specified in the indictment from Fingland's cart, that no charge or prosecution of any kind should ever afterwards be brought against him."

"The Advocate-depute answered, that the declarations had been regularly proved by the most unexceptionable witnesses to have been freely and voluntarily emitted; and that the pannel was at the time sober and in his sound senses: that the proof offered in support of the statement now made was equally incompetent and irrelevant; for though the facts alleg-

DUMFRIES.  
April 19, 1819.

Lords Pitmilley  
and Succoth.  
*Maconochie, A. D.*



ed were established, they were of no consequence, and could not invalidate the declarations ; but that he had no reason to believe that there was any truth in the averments made."

The "Lords having considered what is above stated, refuse to allow a proof of the objection stated; repel the said objection, and allow the declarations objected to be read to the jury."

No. 51.

WILLIAM WARD.—*G. Graham Bell.*

JEDBURGH.

April 24, 1821.

*Citation.*—Upon calling the diet of the criminal letters "against William Ward, now or lately residing at Roansgreen, in the county of Cumberland,"—*Lord Justice-Clerk.* Maconochie, *A. D.* "Mr. George Graham Bell, as counsel for the pannel, objected to the citation of the pannel,—that it appeared from the criminal letters that pannel was a foreigner domiciled in England: that he had been liberated after apprehension upon a bail-bond by William Rutherford, junior, writer in Jedburgh, which condescended on his writing-office as a domicile at which pannel might be cited: that, in these circumstances, the only proper warrant for citation which could be inserted in the criminal letters, was one to cite at the conventional domicile, and also at pier and shore: in place of this the warrant gave authority to cite personally, or at head burgh of the shire where pannel resided: that the warrant in the criminal letters must measure the messenger's powers; and it was, therefore, impossible for him to fulfil the requisites of the law, because the libel was irregular and deficient in not containing the competent and legal warrant: that the two citations by the messenger were both irregular and unwarranted; and

that he, being a Scotch officer, could not give an effectual citation in England, the criminal letters containing no warrant to do so; and that, therefore, the personal citation given in Cumberland was incompetent: that, for the same reason, the citation given at Mr. Rutherford's office was equally irregular and unwarranted, the libel neither relating the bail-bond, nor giving any authority to cite at the conventional domicile."

"Mr. Advocate-depute answered, that the citation given at Mr. Rutherford's office, the domicile specified in the bail-bond on which the prisoner had been set at liberty, was given in direct obedience to the will of the criminal letters, which, according to uniform and invariable practice, ordains him to be charged "personally, if he can be apprehended, and, failing thereof, at his dwelling-place;" and as Rutherford's office is pointed out as the domicile in the bail-bond, it is quite evident that a citation there was sufficient. In order, however, that the pannel might not have any sort of ground of complaint, a copy of the libel was delivered to him personally in England; so that, instead of having suffered any hardship, the pannel has in mera gratia of the prosecutor been treated with more indulgence than was necessary. On the whole, he submitted the objection ought to be repelled."

Lord Justice-Clerk "repelled the objection."

No. 52.

WILLIAM CRICHTON.—*Fergusson*.

AYR.

May 4, 1821.

*Indictment—Instance—Copy.*—In the case of Wil-

liam Crichton, accused on criminal letters of as-  
Lord Justice-Clerk. sault,—

Maconochie, *A. D.* “Fergusson, for the pannel, objected, that the copy of the libel served upon the pannel, and now produced, bears not that the charge proceeds at the instance of his Majesty the King, upon the information of his Majesty’s Advocate, in the words of style “shewn us by;” but the word “by” being left out in the copy, the sentence runs either as if the indictment proceeded at the instance of his Majesty and his Advocate, or as if his Majesty and his Advocate were identically the same person, or is altogether unintelligible; and if the record copy of the libel served upon the pannel is not equally deficient with that served upon the pannel, it is at least indisputable that in the latter a most essential part is left out.”

The Lord Justice-Clerk “sustains the objection, and dismisses the pannel with the libel.”

# DECISIONS

OF THE

COURT OF JUSTICIARY,

FROM

NOVEMBER 1821.

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HIGH COURT OF JUSTICIARY.

DONALD RANKINE.—*Murray—Fletcher.*

No. 53.

*Verdict.*—Rankine was tried at Inverary, on the 11th of September 1821, for robbery ; and the jury having brought in a verdict of guilty, “ Fletcher, for the pannel, stated, that no sentence could pass upon the verdict of the jury, in respect the date affixed to that verdict was the 11th day of September 1821 ; whereas it was notorious to the Court that the jury were not enclosed, under the interlocutor of Court, till past twelve o'clock, that is to say, till the 12th day of the month foresaid.” Lord Succoth, after allow-

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ing a proof, before answer, certified the case to the High Court, where Murray resumed the objection,—  
 “ Because it is proved, by the verdict entered upon the record of this Court, that it was made out on the 11th of September ; and it is proved, and not denied, that the jury was not enclosed until the 12th. What they might do on the 12th, while enclosed, does not appear ; but the verdict recorded was made out before the jury was enclosed ; and, therefore, according to the statute 1587, c. 91, the pannel is entitled to be acquitted.”

“ Hope, Advocate-depute, in respect that the Court did not require any answer to this objection, simply referred to the case of M'Kay, Inverness, May 1785.”

The Lords “ having considered the verdict of assize returned in this case, with the objection in arrest of judgment, certification thereof to this Court, and heard the counsel for the pannel in support of the said objection, repel the said objection.”

#### No. 54.

WILLIAM EWING and Others.—*Robertson.*

Nov. 19, 1821. *Assault, aggravated by Illegal Combination.*—Ewing and others were indicted at Stirling “ for the crime of attacking, assaulting, beating, and wounding the lieges, more especially when such assault is committed by persons who have struck work in a body, or in great numbers, at once, or nearly at one and the same time, on account of a reduction of their wages, or the prices of their work, with intent to intimidate workmen or artificers, willing to work at reduced wages, from so working.” To the relevancy of this indictment it was objected, “ that it charges

the crime of combination as an aggravation of the crime of assault, while these two crimes are not of the same nature, and ought, of course, to be charged as separate offences."

Lord Gillies certified the objection to the High Court; and counsel having been heard on it, "the Lords repel the said objection, and find the indictment, as laid, relevant to infer the pains of law."

ROBERT LAUGHLAN.—*Napier*.

No. 55.

*Punishment—Assault on a Magistrate.*—Laughlan Nov. 19, 1821.  
was accused and convicted at Ayr "of the crime of assault, more especially when committed on the person of a magistrate when engaged in preserving the peace." Lords Hermand and Meadowbank certified the case, as to the punishment to be inflicted. The Court ordained him to be imprisoned for twelve months from the date of the verdict.

PETER M'GEOWN and H. CAVAN.—*Cullen—Smythe*.

No. 56.

*Locus Delicti.*—M'Geown and Cavan were indicted for theft, "in so far as, upon the 5th day of July, &c. you did, upon one or other of the streets of the burgh of Perth, or at some other place to the prosecutor unknown, both and each or one or other of you steal, &c. from one of the pockets of George Pentland, then, and now or lately coachmaker in Perth, ten bank or bankers notes for five pounds sterling each," &c.

Cullen and Smythe, for the pannels, objected to

the latitude taken in the description of the locus delicti.

The Lords "repel the objections stated to the relevancy of the said indictment."

No. 57.

J. DOUGLAS and M. ADIE.—*Cullen.*

Jan. 28, 1822.

*Verdict.*—On the 18th of July 1821, a verdict was returned by a jury, finding Douglas and Adie guilty of assault and robbery. To this verdict it was objected, that it was partly written and partly printed. Thereafter, "the Lords, &c. having considered the verdict returned in this case, and heard parties procurators at great length upon the validity thereof, sustain the said verdict."

No. 58.

JOHN OF ALEXANDER CAMPBELL.—*Smythe.*

June 3, 1822.

*Fraud, aggravated by a prior Conviction.*—Campbell was indicted at Inverness for the crimes of "falsehood, fraud, and wilful imposition, particularly when practised in order to obtain, by false pretences, the money or goods of others, and when, in consequence thereof, money or goods are unduly and feloniously obtained, and especially when committed by a person who has been previously convicted thereof, are crimes of a heinous nature."

"Smythe, counsel for the pannel, objected to the indictment, in so far as the major proposition charged previous conviction as an aggravation of the offences." Lord Meadowbank having certified the objection, the Court "repel the said objection, and find the indictment relevant to infer the pains of law."

R. YOUNG and J. MORRISON.—*J. Tait—Rattray.*

No. 59.

*Execution against Pannel—Power to withdraw an erroneous Execution.*—Young and Morrison were indicted to stand trial at Glasgow on the 22d April 1822. At the conclusion of the business of that day, the diets of cases not called were adjourned in common form. On the 25th, Young and Morrison were brought up for trial, when “Tait and Clerk Rattray objected, that, on the 22d April, when the diet of the criminal letters was called and continued, the execution against the pannels laboured under the objection, that it did not state that the copy served on the pannels had been subscribed by the messenger on each page; and that it was only on the 24th that that faulty execution was withdrawn, and the regular execution, which is now in process, was lodged: that, if the former execution was irregular, the pannel was not legally before the Court on the 22d. The calling and continuing the diet on that day was, therefore, of no effect; and the diet, which is peremptory, perished completely by not being called on the 22d, and cannot now be revived on the 25th.”

“Hope, Advocate-depute, answered, that the diet in this case was not called on the 22d of April, as the record proves. On that day, the whole diets of Court were adjourned,—an act of the Court itself, at which the pannels were not and need not be present, and at which the presence of the prosecutor is not necessary: that the adjournment is not equivalent to calling the diet: that the execution is merely the evidence of the legality and accuracy of the pannel’s citation: that there is no rule which fixes that this exe-



cution must be in process at any time before the diet is *called*, and the case proceeds; and that there seems no ground upon which the Court can require the evidence of the citation to be in process until the period when the Court is called upon to take cognizance, and to judge of that evidence, viz. when the diet is called: that the execution now in process was lodged, therefore, in due time, and must be received: that of the state of the process on the 22d the Court was not called upon or in a condition to take cognizance: that the pannels were not present to object; and, if present, could not have objected to the general adjournment of the diets of Court on the 22d, or stated the alleged objection to the execution then in process; for, as the diet against them was not called, they could not be heard for that or any other purpose; and, therefore, it can be of no moment what execution was then in process. When the diet is called, when the prosecutor is ready to insist, and the Court, for the first time, is in a condition to judge of the evidence of the legality of the citation, that evidence is regularly produced."

Lords Succoth and Meadowbank certified the case. Whereupon, "the Lords, &c. having considered the objections stated to the execution of citation returned in this case, certification thereof from the Circuit Court at Glasgow, and heard parties procurators, sustain the said objections, and dismiss the libel, and the pannels from the bar."

No. 60.

A. KERR.—*Napier*.

June 3, 1822.

*Contempt of Court—Witness refusing to answer.*—Kerr was "adduced as a witness in the trial of James

Roxburgh, accused of the crime of assault, at the last Circuit Court of Justiciary held at Ayr; and after taking the usual oath to tell the truth, and certain interrogatories having been put to him, he remained mute; whereupon Lord Hermand and Lord Pitmilley, Judges on the said circuit, ordained the said Alexander Kerr to be imprisoned in the tolbooth of Ayr, till liberated in due course of law." A petition was thereafter presented by Kerr, admitting his offence, expressing contrition, and praying for liberation. Their Lordships certified it to the High Court, who found, "that the conduct of the petitioner was highly criminal, and calculated to obstruct and defeat the course of justice;" and ordained him to be imprisoned for four months.

JOHN DREW, Complainer.—*Shaw.*

No. 61.

THOMAS WARK, Respondent.—*Sandford.*

*Process—Competency of Advocation after Appeal entered.—Stat. 20. Geo. II, c. 43.*—Wark, with the concurrence of the procurator-fiscal, raised a criminal libel against Drew before the Sheriff of Lanarkshire, concluding for damages, fine, and imprisonment; and the Sheriff, after advising a proof, on the 29th August 1820, decerned for a sum of damages, and granted warrant for instant imprisonment until paid. Drew immediately entered a minute on record, by which he declared his intention to appeal to the next Circuit Court, and lodged a bond of caution, in terms of the statute. He did not prosecute the appeal; but, on the 8th of September, presented a bill of advocation of the Sheriff's judgment. This bill was objected to as incompetent, in respect that,

June 3, 1822.

by entering the minute of appeal, and executing a bond of caution, "to answer and abide by the judgment of the Circuit Court," the process of appeal was commenced, and Drew was barred from resorting to advocacy. To this it was answered,—1. That the steps adopted by him were not sufficient to entitle him to be heard in the Circuit Court, and, consequently, that there was no legal appeal; and, 2. That even if there had been an appeal, yet, as there was no judgment of the Circuit Court on it, he had still a right to be heard. The Court, on advising minutes, repelled the objection to the competency.\*

A. P. HENDERSON—D. FISHER,—Agents.

No. 62.

J. or A. CAMPBELL,—*Smythe*.

June 8, 1822.

*Statute 1701, c. 6.*—On the 5th November 1821, Campbell was imprisoned on a charge of falsehood, fraud, &c.; and, on the 8th of April 1822, he was brought up for trial, when the diet against him was continued, and his case certified to the High Court, till the 20th May 1822. In the meanwhile, on the 27th of April, he executed letters of intimation, under the act 1701, c. 6, against the Lord Advocate. The diet for the 20th of May was adjourned till the 3d of June; and on that day it was deserted pro loco et tempore. In these circumstances, he presented a petition, on the 8th of June, for liberation, in respect that forty days had elapsed since the letters of intimation were served; and that the desertion of the

\* This case reported from the printed papers.

diet on the 3d of June was "a not insisting at the diet," under a fair construction of the act 1701; and he referred to the case of Borthwick.\* The Lords, &c., "having considered the foregoing petition, and heard parties procurators at great length thereupon, refuse the petition, as incompetent."

W. M. BORTHWICK.—*Cockburn.*

No. 63.

*Expences—Forfeiture of Bond of Caution to Insist.* June 17, 1822,  
—"Mr. H. Cockburn, advocate, as counsel for William Murray Borthwick, printer, sometime residing in Hamilton, stated, that his client had been served with criminal letters at the instance of Robert Alexander, proprietor and publisher of the newspaper called "the Glasgow Sentinel," to stand trial before their Lordships this day, for the crime of stealing certain manuscripts and documents from the office of the said newspaper: that as the said R. Alexander had abandoned his instance, decret for expences should be given against him; and that the bond of caution for insisting should be forfeited, and decret given against the cautioner for the said expences, and the whole penalties of the said bond," "The Lords, &c., in respect that the private prosecutor has abandoned the prosecution, dismiss the libel, and declare the bond of caution granted for reporting and insisting in the criminal letters to be forfeited: find the said Robert Alexander liable to the said W. M. Borthwick in the expences incurred by him in preparing for his trial, and allow, &c.; and appoint intimation to be made to the cautioner in the foresaid

\* This case not entered in the record.

bond of caution, that he may be heard for his interest against the demand for having him found liable in expences."

No. 64. JOHN ANDERSON and JEAN FOGARTY.—*A Dunlop, jun.*

July 8, 1822.

*Witness—Infamia Juris—Desertion of a Soldier to the Enemy.*—In the course of the trial of Anderson and Fogarty, a witness, L. M'Gavin, having been adduced, "Dunlop, for the pannels, objected to the admissibility of this witness, and offered to prove that he had been condemned by a court-martial for desertion to the enemy at the siege of Ciudad Rodrigo, and that, therefore, he must be held to be infamous, and incapable of bearing testimony,—1. Because desertion on the part of a soldier implied a breach of a most solemn oath. 2. That desertion to the enemy was, in substance, an act of treason; and, 3. That the offence inferred infamia juris."

"Mr. Solicitor-General answered,—That infamia juris was a legal disability, arising from the verdict of a jury, convicting of certain species of offences, and the sentence of a court of law consequent upon such a verdict. The nature of the offence and the constitution of the tribunal were both important. A conviction of theft before a Sheriff, without a jury, did not infer infamia juris; while conviction of the same act of theft by verdict of a jury would have inferred infamia juris. Again, a conviction of assault by verdict of a jury before the Supreme Court would not infer infamia juris. In the present case, both essentials were wanting: the conviction was not by verdict of a jury, and the offence was not that which in-

ferred infamia juris. It has been said that it implied a breach of oath, and was, in substance, treason ; but this was matter of argument ; and, at all events, the conviction was not of either of these offences, and did not draw after it the consequences of conviction of either. It did not draw after it a forfeiture and corruption of blood ; and this being clear, there was no ground for maintaining that such sentence of a court-martial could infer any other legal incapacity, or the loss and forfeiture of any other legal right." " The Lords, &c. repel the objection, and allow the witness to be examined, cum nota."

GEORGE BUCKLEY.—*A. Dunlop, jun.*

No. 65.

*Housebreaking, with intent to Steal, aggravated by Habit and Repute a Thief.*—At the Glasgow spring circuit, Buckley was accused " of the crime of house-breaking, with intent to steal, aggravated by being habit and repute a common thief." To the relevancy of this charge it was objected, " in so far as it charged the pannel being habit and repute a common thief, as an aggravation of the crimes of housebreaking, with intent to steal." The objection having been certified, the Court, after having ordered minutes, found " the aggravations of habit and repute a thief, and being previously convicted of theft, not relevant ; but find the indictment, quoad ultra, relevant to infer the pains of law."

July 12, 1822,

No. 66.

J. OF A. CAMPBELL.—*Smythe*.

July 13, 1822. *Statute 1701, c. 6.*—Campbell, who had been imprisoned in November 1821, on a charge of falsehood and fraud, presented a petition to the Court, praying for liberation on the act 1701, on these grounds, that, “on the 27th of April 1822, he executed letters of intimation against the Lord Advocate, and on the 26th of June he was served with an indictment, calling him to appear and stand his trial on Monday the 15th instant.” He offered to prove, “that the intimation took place between three and four o’clock in the afternoon of the 27th of April, and that the indictment was served between nine and ten o’clock of the evening of the 26th of June, so that a period of sixty days and six hours had intervened.” He pleaded, that whether the time was to be computed *de momento in momentum*, or by the number of civil days, he was entitled to be liberated; and referred, in support of his plea, to Mitchell against Watson, February 3, 1801, and Hood, Henderson, and Company against M’Kirdy, December 14, 1813. The Lords, &c. “having considered the foregoing petition, and heard parties procurators at great length thereupon, refuse the desire of the petition.”

## CIRCUIT COURT OF JUSTICIARY.

## NORTH CIRCUIT.

ALEXANDER SINCLAIR.—*J. P. Grant.*

No. 67.

*Witness—Pupil.*—In the course of the trial of Alexander Sinclair for murder, James M'Kay was ad-  
 duced as a witness, who, "it appeared, on being questioned by the Court, was of the age of twelve years, could read, but did not understand the nature of an oath, and said he did not know that God would be offended with him if he told what was not true. It was, therefore, objected by the pannel's counsel, that he could not be examined. The Lord Meadowbank, however, in respect the decisions of the Court have allowed persons in the situation of the witness to be examined by way of declaration, repelled the objection, and allowed the witness to be examined without being put upon oath."

INVERNESS.  
 April 8, 1822.

Lord Meadowbank.  
 Mensies, A. D.

ROBERT M'INTOSH.—*Smythe.*

No. 68.

*Witness—List of Witnesses—Interpolation of Warrant.*—M'Intosh was indicted for murder; and the prosecutor having proposed to examine "Charles Gordon, now or lately residing at Bush of Crathionard aforesaid,"—"Smythe, for the pannel, objected

ABERDEEN.  
 April 16, 1822.  
 Lords Gillies and  
 Meadowbank.  
 M'Neill, A. D.



to the witness, upon the ground that he was not cited on a sufficient warrant. The words, " of Crathionard," &c. formed an essential part of the witness's designation; yet he averred that these words were inserted after the subscription of the Advocate-depute had been affixed to the list which is attached to the indictment, and to which alone the precept of the Court of Justiciary applies. It is true, this was done by Mr. Simpson, the procurator-fiscal, who is the avowed agent of the Lord Advocate; but it was decided in the case of Smith and others, May 26, 1778, Hume, vol. ii, p. 242, that the list must be subscribed by the prosecutor himself, and not by his agent. If, therefore, this amendment had been made in the form of a marginal note, signed by Mr. Simpson, it must necessarily have been rejected; and it cannot make the case better that this designation was completed by an interlineation, after the list was transmitted to the county."

The Advocate-depute answered, " That there is no allegation that the designation was not completed in the record before the libel was executed: that there is no necessity for having the record written by any particular person, or all of it by the same hand: that there is no rule of law to prevent the public prosecutor from signing lists with blanks, or even blank sheets, to be afterwards filled up: that it is notorious that the public business could not be carried on unless this was done, not only in regard to lists of witnesses, but even in regard to lists of assize signed by the Judges." " The Court repelled the objection."

JOHN WAKEFIELD.—*J. W. Dickson.*

No. 69.

*Warrant of Citation—Porteous-Roll—Sheriff's Precept.*—Before the indictment was read against Wakefield, “J. W. Dickson, for the pannel, objected, in bar of trial, that his client was not bound to plead to the indictment, in respect that he had not been cited upon a regular warrant, the precept issued by the Sheriff of Fife upon the porteous-roll, in virtue of which the citation had been given, being only signed on the last page thereof, and, therefore, an incomplete warrant.” “The Advocate-depute answered, that a very unnecessary practice prevailed in some counties, of the Sheriffs issuing their precepts to their officers for citing delinquents, witnesses, and assizers. This practice was perfectly unnecessary, as the precept issued by the authority of the High Court of Justiciary, annexed to the porteous-roll, being directed to the Sheriff-depute of the county, his substitutes, and officers whatever, was a complete warrant to sheriff-officers for executing the whole porteous-roll; and the superadding a precept by the Sheriff only tended to give rise to mistakes, and frustrate the ends of justice.”—“The Lords having considered the foregoing objection and answer, they find that the Sheriff's precept was unnecessary: that the precept issued under authority of the High Court of Justiciary is a complete warrant to sheriff-officers for executing the whole writs connected with the porteous-roll; and, therefore, repel the objection, and allow the trial to proceed.”

PERTH.  
Sept. 14, 1822.  
Lords Hermand  
and Succoth.  
Hope, A. D.

No. 70.

JOHN PURVES.—*Moncreiff—G. Grant.*

PERTH.  
Sept. 16, 1822.

Lords Hermand  
and Succoth.  
Hope, A. D.

*Witness—Designation—Citation.*—In the course of the trial of Purves, on James Cooper, a witness, being adduced, “ Moncreiff and Grant objected for the panel, that there is no valid execution against the witness : that the execution returned does indeed bear, that the officer had lawfully cited James Cooper, the witness tendered, among others ; but it farther proceeds, and necessarily proceeds to state, that he did cite the witnesses enumerated, by apprehending personally various individuals ; and among those is no witness of the name of *James Cooper*, though there is a person of the name of *John Cooper* : that, in these circumstances, there was no execution of any citation of James Cooper, as the officer certifies that he cited such a person, solely by apprehending personally a number of other persons, among whom is *John Cooper* ; and that, on the other hand, *John Cooper* does not describe any person previously mentioned in the execution. The Lord Succoth, &c. repels the said objection, and allows the witness to be received.”

No. 71.

G. JOHNSTONE and J. FERGUSON.—

PERTH.  
Sept. 16, 1822.

Lords Hermand  
and Succoth.  
Hope, A. D.

*Witness, Designation of.*—On “ David Annal, now or lately apprentice to William Anderson, mason in Lochee, in the parish of Liff, in the county of Forfar,” being offered as a witness, “ it was objected, that he resides in the united parish of Liff and Benvie, and that there is in fact no such parish as Liff. Repelled.”

ANDREW ROSS.—*Riddell*.

No. 72.

*Fire-Raising*.—Ross was indicted for the crime of wilful fire-raising,—“ In so far as, &c. you did wickedly, &c. with a burning peat, or otherwise, to the prosecutor unknown, set fire to the muir on some muir-ground, in the immediate vicinity of a large wood, &c.; and the said fire having taken effect, consumed and destroyed the heather on a large track of the said muir-ground, and extended to within a few yards of the said wood, and was with great difficulty extinguished; and this you did with the felonious design of consuming and destroying the said wood,” &c. “ at least, time and place foresaid, the heather on the said muir-ground was wilfully and maliciously set on fire, and a large track thereof consumed; and you the said Andrew Ross are guilty thereof,” &c. Riddell, for the pannel, objected to the relevancy of the indictment, that “ the facts alleged do not bear out the charge of wilful fire-raising. The subsumption of the minor proposition amounts to a mere charge of burning heather, with the intent of burning a wood; and, in the “ at least” clause, it is still farther contracted to a charge of burning heather alone,—a statutable offence of 40s. fine, by statute 13. Geo. III, c. , and made cognizable by the justices of the peace by the same statute.”

H. J. Robertson, Advocate-depute, answered, “ That the indictment charges the felonious and malicious setting fire to a muir, a great part of which was actually consumed; and this is aggravated, in the first part of the indictment, by a statement of a particular intention to consume a wood. In the “ at least”

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INVERNESS.  
Sept. 26, 1822.  
Lord Hermand.  
H. J. Robertson,  
A. D.

clause, this aggravation is not charged, but merely the malicious and felonious setting fire to and consuming the muir, which is a relevant charge, and cognizable as fire-raising in this Court." The Lord Hermand having considered the indictment, &c. and heard parties procurators on the relevancy thereof, sustains the objections offered thereto, and "finds the indictment irrelevant."

## WESTERN CIRCUIT.

DUNCAN KENNEDY and Others.—*Fletcher.*

No. 73.

*Witness—Malice—Interest.*—On Lieutenant Donald M'Phie being adduced as a witness against Kennedy and others, accused of sheep-stealing, "Fletcher, for the pannels, objected to the admissibility of Lieutenant Donald M'Phie, on the ground of malice, and interest in the conviction of the prisoners at the bar. The proposed witness competed with the prisoners for the farm of Strone, and failed to obtain it. This created a hostile feeling in him towards the prisoners. He, sometime *before* the present charge was made, went to a creditor of the prisoners, and offered to buy up his debt, with the view of ruining the prisoners; and when his offer was declined, he said, "If this will not, some other thing will;" meaning, that if he could not accomplish their ruin by civil diligence, he would swear a crime against them which would affect their lives. His interest in doing this was to get possession of the grazing of Strone, which was a desirable acquisition to him."

INVERARY.  
April 15, 1822.  
Lord Succoth.  
Lockhart, A. D.

"Lockhart answered, That the statement of the counsel for the pannels did not embrace any circumstances from which, granting them to be truly narrated, it ought to be inferred that Lieutenant Donald M'Phie should be excluded from the privilege of purging himself in *initialibus*." Lord Succoth, after allowing a proof, "having considered the foregoing objections, with the evidence of the above witness, repels the objections; finds that the witness is admissible, reserving his credibility to the jury."

No. 74.

HELEN RENNIE.—*Jardine—Hannay—J. Tait.*

GLASGOW.  
April 20, 1822.

Lords Pitmilley  
and Succoth.  
Hope, A. D.

*Proof.*—Helen Rennie was indicted for the murder of her child by poison ; and her counsel having proposed to ask one of her witnesses, Dr. Andrew Reid, “ Whether he knew of any instances ever having taken place at the Apothecaries Hall, in Glasgow, of a mistake in retailing medicines of as dangerous a nature as if king’s-yellow had been sold for sulphur ? ” and this question having been objected to by the Advocate-Depute, Jardine, for the pannel, stated, “ that their Lordships interlocutor on the relevancy allowed her to prove all facts and circumstances tending to exculpate her or alleviate her guilt : that the prosecutor had asked one of his witnesses, whether he ever heard of king’s yellow having been, on any occasion, sold by mistake for king’s sulphur at the Apothecaries Hall ? He, therefore, contended, that he was entitled to prove instances of mistakes at the Apothecaries Hall, which were as dangerous, and as unlikely to have taken place, as that of king’s-yellow for sulphur.”

Hope, Advocate-depute, answered, at considerable length, but in substance,—1. That there was no evidence whatever that the king’s-yellow, proved to have been administered to the child, was bought at the Apothecaries Hall. 2. That even if proof were offered of king’s-yellow having been there sold for sulphur by mistake, it would be inadmissible, as it was not shewn that the pannel had purchased there the king’s-yellow given to the child ; and even if it were so, it would be irrelevant. 3. That, at all events, evidence of mistakes between other substances was not admis-

sible, for it could never prove that king's-yellow had actually been sold for sulphur; and as it was impossible to bring forward all the circumstances attending each mistake, any such evidence must be imperfect and deceitful. "The evidence having been rejected as not legal evidence," the Advocate-depute stated, that having saved the point of law, he was willing to admit the evidence, if the jury wished it. The jury declined to hear the evidence.

WILLIAM CAMPBELL and Others.—*J. Tait*,  
and  
CATHERINE MILLER and Others.—*A. Connell*.

No. 75.

*Locus Delicti.—Accumulation of Actions.*—These persons were charged, in one indictment, with the crimes of theft, especially when committed by means of housebreaking, and by persons who are habit and repute common thieves; and of reset of theft. Campbell and others were charged with the theft, accompanied by its aggravations; and Catherine Miller, and two other women, were accused of the reset of theft. The locus of the reset was described as "within a house situated in Market Lane, or Market Street, in Glasgow, then occupied by William Young, weaver in Glasgow, or at some other place, to the prosecutor unknown."

GLASGOW.  
April 22, 1822.

Lord Succoth.  
Hope, A. D.

Connell, for Miller and others, "objected, That the locus delicti of the reset was not sufficiently specified: that the receiving was stated to have taken place within a house situated in Market Lane, or Market Street, in Glasgow, or at some other place to the prosecutor unknown: that this addition, of some place



unknown, was not admissible : that the prosecutor should limit his proof to the place specially mentioned : that the pannels suffered material prejudice from this vague statement, whilst the prosecutor could have had no difficulty in fixing on the particular place of reset or possession.

“ Hope, Advocate-depute, answered, That it was not necessary to mention any *place* in *charging* reset of theft : that it was enough to *prove* the fact of possession, and such circumstances as evinced that the pannels knew that the articles so traced into their possession were stolen : that the place where they might have received the goods was noways essential to the description, much less to the proof of the crime : that there were many cases of indictments for reset of theft, of which he quoted two, in which no place was charged ; and innumerable cases, of which he quoted several, in which, though a place was charged, the indictment added, “ or at some other place to the prosecutor unknown ;” and he, therefore, submitted, that the objection ought to be repelled.

“ Tait, for the other pannels, objected to the accumulation, in one indictment, of the two separate crimes of theft and reset of theft,—the former charged against three of the six pannels, and the other against the other three. Two separate crimes may be put into the same indictment, if both are charged against all or any one of the pannels, but not where some of the pannels are charged *only* with one of the crimes, and the rest *only* with the other.

“ Hope, Advocate-depute, answered, That this point was settled by long practice : that there were many indictments drawn in the same form, which had been

sustained as relevant, and referred to several : that the persons severally guilty of the crimes of theft and reset were often intimately connected in the perpetration of these offences : that the one crime was generally the continuation or consummation of the other ; and that, both from the reason of the thing, and strict legal principle, it was correct to include the thief and the resetter in the same indictment.”  
 “ Lord Succoth repels the objections.”

HILL BOYD HAY.—*A. Connell.*

No. 76.

*Proof.*—In the trial of Hay, after a witness, Helen Cameron, had been rejected, and while the prosecutor was examining Ann Rankine, “ Connell, for the pannel, objected to the prosecutor pointing out to the witness, whilst under examination, Helen Cameron, whose designation had been found erroneous, and, therefore, had not been examined, but had remained in Court ; and to his examining the former with respect to the share which the person whom he now pointed out had in apprehending the pannel. He stated, that Helen Cameron, not having been duly cited, ought not to have been in Court at all : that the prosecutor had no right to produce her in any way, unless he had given due notice in the indictment of his intention ; and that the necessity of libelling the subjects to be used in evidence applied to animate as well as to inanimate objects.”

Hope, Advocate-depute, answered, “ That the person pointed out to the witness had no doubt been wrong designed ; but that as he was entitled to point out to a witness any persons in Court,—to ask the witness whether such persons were present at the appre-

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 April 22, 1822.  
 Lord Succoth.  
 Hope, A. D.

hension and detection of the pannel, and to inquire what share they took in securing the pannel or the stolen property, in so far as the witness had personal knowledge, from presence at these facts,—he could not lose his right to examine, on the same principle, in regard to this person, Helen Cameron, merely because she had been included in the list of witnesses, and wrong designed. That error prevented *her* examination; but it does not occur how it can prevent the examination of another witness as to what that person, so erroneously designed, actually did. That he does not *produce* Helen Cameron, but simply desires a witness to look at her, and to say what she did: that it would have been competent to ask if Helen Cameron was present at the pannel's apprehension, and what she did, although Helen Cameron was not in Court: that the objection, that neither “animate nor inanimate” objects could be shewn or produced in evidence without being mentioned in the libel, applies only to such objects as are to form part of the process, and to be sent to the jury after they retire: that the prosecutor has no intention to make Helen Cameron form part of the process, or to send her as a production for the inspection of the jury when they retire. This objection is, therefore, utterly groundless.”

“The Lord Succoth repels the objection.”

No. 77.

WILLIAM LEE.—*Cockburn—J. Tait.*

GLASGOW.

April 25, 1822.

Lords Succoth and  
Meadowbank.  
Hope, A. D.

*Statute 22. Geo. III, c. 60—Prescription.*—Lee was indicted for the crime of seducing artificers to go out of this kingdom into a foreign country, con-

trary to the provisions of the Act 22. Geo. III, c. 60. “ Cockburn, for the pannel, stated, That, under the statute libelled on, the alleged offence was prescribed; and that, therefore, the Court could not try the pannel, and he ought to be dismissed simpliciter from the bar.” Hope, Advocate-depute, answered, “ That, under the statute libelled on, there was no prescription in regard to this prosecution.” The Court certified the objection.\*

JOHN M'INTYRE and MALCOM M'INTYRE.—*Whigham—Lockhart.*

No. 78.

*Execution—Porteous-Roll—Assize.*—In the case of John M'Intyre, “ the procurators for the pannels objected to the trial of the pannel proceeding, because there was not a sufficient number of assizers lawfully cited to pass on their assize : that the sheriff-officer's execution against the assizers of Argyleshire bore, that he passed, at command of the porteous-roll for the county of Argyle, dated at Edinburgh the 6th day of *August* last, whereas the true date of the porteous-roll was the 6th day of *July* : that it is in virtue of the warrant in the porteous-roll, and the precept of the Sheriff thereon, *jointly*, that the officer proceeds, and not on the precept of the Sheriff itself : therefore, the execution must describe *the warrants* correctly upon which it proceeded, or it must be held to have proceeded upon warrants which are not produced, and, therefore, are good for nothing : and the gentlemen alleged to have been summoned cannot

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Sept. 7, 1822.  
Lord Pitmilley.  
M'Neill, A. D.

\* No farther notice of this objection is in the record.

pass upon the assize ; and as thus there were only ten assizers summoned from Bute, the trial could not proceed."

" Menzies and M'Neill, Advocates-depute, answered, That the sheriff-officer, in summoning the assizers, did not act under the warrant in the porteous-roll, but in virtue of the precept which the Sheriff, in obedience to the porteous-roll, issued to his own officers; and, accordingly, the execution, after the words quoted, bore, " and of the Sheriff of Argyleshire his precept thereon, dated at Inverary the 3d September:" that it could not be denied that the porteous-roll contained a regular warrant to the Sheriff; and that the Sheriff's precept, issued in obedience to the porteous-roll, and referring to it, did so correctly, and was, in every respect, regular; and that the execution referred correctly to the Sheriff's precept, which was its proper warrant; consequently did all that was requisite: that, therefore, the blunder which it committed, in describing the date of the porteous-roll, which it need not have described at all, was not one which can render the execution null."

" The Lord Pitmilley having considered the foregoing objection, repels the same, and allows the trial to proceed."

## SOUTH CIRCUIT.

JAMES BURTNAY.—*Pyper.*

No. 79.

*Execution against Witnesses.*—On Burtney being brought up for trial, “the Advocate-depute, in respect of an error which he had discovered in the execution against the witnesses, moved the Court to desert the diet against the pannel pro loco et tempore.”

AYR.  
Sept. 21, 1822.

Lord Justice-Clerk.  
Dundas, A. D.

The execution was in these terms.—

“I, Angus Gunn, sheriff-officer of Ayrshire, by virtue of the Sheriff-substitute of Ayrshire his precept, subjoined to a list of assizers and witnesses, and issued for the ensuing circuit, of date, &c. passed, and in his Majesty’s name and authority, and in name and authority of the said Sheriff, lawfully summoned,” &c.

“The Lord Justice-Clerk declares the diet against the pannel to be deserted pro loco et tempore.”

Three other cases were deserted on the same account.

WALTER CRAWFORD.—*Pringle.*

No. 80.

*Execution against Pannel.*—“Pringle, for the pannel, objected to the execution of the libel, on the ground, that it bore to have been executed by a sheriff-officer, who had not been duly authorized by a precept from the Sheriff. The narrative of this execution did, indeed, state, that it proceeded on a precept of the Lords of Justiciary, addressed to the Sheriff; but as it did not bear that

JEDBURGH.  
Sept. 31, 1822.  
Lord Gillies.  
Dundas, A. D.

the Sheriff had issued his precept, proceeding on the former, a most material step in the regular forms of execution had been omitted, and the officer must have acted without proper authority.—Hume, ii, 286.”

“ Dundas, in reply, maintained, That the want of the Sheriff’s precept was no objection, the Justiciary precept, annexed to the porteous-roll, being addressed to “ messengers, sheriffs, *and their officers whatsoever* :” that this is quite a sufficient warrant to the officer, without any precept from the Sheriff: that Hume merely alludes to the usual practice ; and that this varies in different counties. The same objection had been already repelled in the case of M’Kenzie, September 1813, Inverness.” Lord Gillies repelled the objection.

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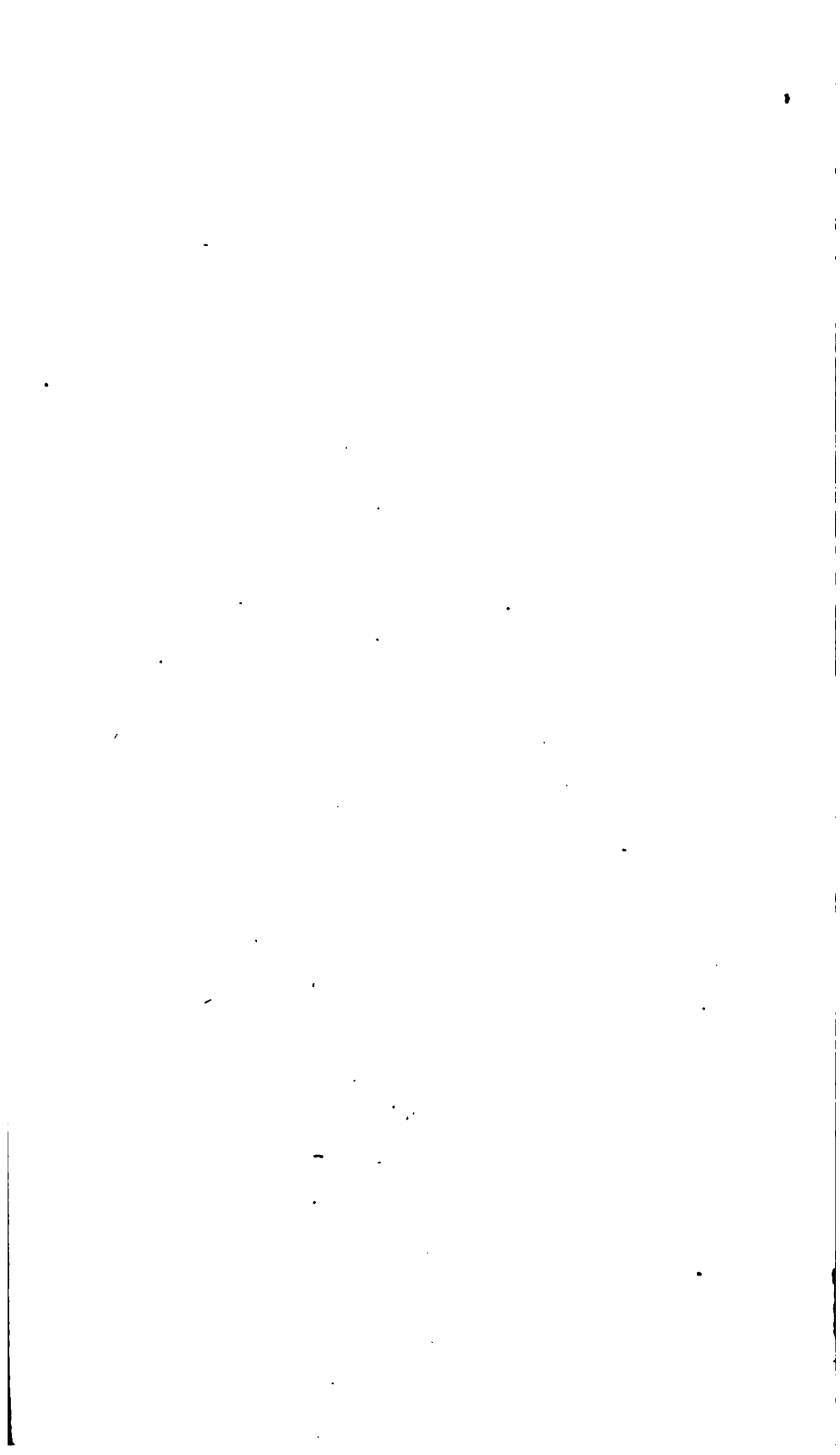
\*.\* The Indictments served on Pannels in the course of last year, both in the High Court and Circuit Court of Justiciary, will be found in the Advocates Library, classed under the heads of OFFENCES against the PERSON and PUBLIC POLICE ; and OFFENCES against PROPERTY.

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## ERRATA IN VOL. I.

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### PART I.

- No. 1, (line 12), p. 6, for 57 read 54.  
No. 5, p. 8, invert the parties names in the title.  
No. 13, (line 9), p. 15, delete *n* of the word *neither*.  
No. 42, (line 3), p. 37, put *the rent* before *sequestered*.  
No. 49, (line 3), p. 43, for *passed* read *sustained*.  
No. 82, (line 8), p. 67, add,—*The Court adhered*.  
No. 88, (line 7), p. 71, for *grounds* read *ground*.  
No. 115, (line 10), p. 92, for *personally not only cited*, read *not only personally cited*.  
No. 122, p. 98, put after *Foreign* —  
No. 139, (2d last line), p. 111, for *work* read *working*.

### PART II.

- No. 185, p. 155, add at conclusion of case,—*The Court adhered*.  
No. 186, p. 156, for c. 139, read c. 137.  
No. 198, (line 3), p. 166, for *was* read *were*.  
No. 287, (line 25), p. 248, for *cotinued* read *continued*.  
No. 293, p. 253, at the end of line 1 insert *was*.  
No. 308, (line 14), p. 267, for £30 bill read £150 bill to extent of £30.  
No. 336, (line 9 from foot), p. 297, after *bar of the*, insert *dissolution of*  
*the*; and in the next line, for *litigated* read *litigant*.  
No. 352, (line 5 from foot), p. 312, for *Martinmas* read *Whitsunday*.  
No. 356, (line 1), p. 315, for c. 157 read c. 137.

### PART III.

- No. 516, (line 1), p. 466, for *Morelanp* read *Moreland*.  
No. 568, (line 12), p. 516, for *heen* read *been*



